Supreme Court, U.S.
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No. 09-921

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In The

Supreme Court of the United States

ELMO GREER & SONS
CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

DAVID GOFF, JOYCE GOFF and AGNES GOFF,

Respondents.

On Petition For A Writ Of Certiorari To The Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a judgment that bears a triple-digit ratio of punitive to compensatory damages a violation of Petitioner's due process rights under the Fourteenth Amendment to the Constitution?

May a state Supreme Court constitutionally impose a punitive damage award that bears a multiplier ratio, punitive to compensatory, of 151 to 1 when this award is in complete disregard of the United States Supreme Court's holding that punitive damages in excess of a single-digit multiplier approach being an excessive fine that is a violation of the Petitioner's constitutional due process rights?

LIST PURSUANT TO RULE 29.6

Petitioner Elmo Greer & Sons Construction Company, Inc. is a privately held corporation organized and existing under the laws of the State of Kentucky.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

RULES INVOLVED IN THIS CASE 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 16

I. THE DECISION OF THE TENNESSEE SUPREME COURT ESTABLISHING THE PUNITIVE DAMAGE AWARD WITH A MULTIPLIER OF 151 TO 1 IS IN SHARP CONFLICT WITH THE PRECEDENT OF THIS COURT AND FAR EXCEEDS THE CONSTITUTIONAL DUE PROCESS LIMITS ON PUNITIVE DAMAGES 16

A. FOR MORE THAN A DECADE, THE UNITED STATES SUPREME COURT HAS HELD THAT, AT MOST, A MODEST DOUBLE-DIGIT MULTIPLIER WOULD PASS CONSTITUTIONAL MUSTER WHEN APPLIED TO THE RELATIONSHIP BETWEEN PUNITIVE AND COMPENSATORY DAMAGES AWARDED BY A JURY UNDER ESPECIALLY EGREGIOUS CIRCUMSTANCES 18

TABLE OF CONTENTS – Continued

Page

B. THE STATE SUPREME COURT CANNOT IGNORE CONSTITUTIONAL LIMITATIONS ON DAMAGES IMPOSED BY THE UNITED STATES SUPREME COURT 22

II. THE TENNESSEE SUPREME COURT HAS SEIZED AUTHORITY FOR ITSELF THAT IS SPECIFICALLY RESERVED FOR THIS COURT 28

A. THE STATE CANNOT CONCLUDE THAT WHAT IS DECLARED UNCONSTITUTIONAL BY THE UNITED STATES SUPREME COURT IS, NONETHELESS, ALLOWABLE UNDER THE STATE CONSTITUTION, AS ANY STATE ANALYSIS OF A CONSTITUTIONAL ISSUE IS SUBSERVIENT TO THE UNITED STATES CONSTITUTION AND ITS INTERPRETATION BY THIS COURT 29

B. THE UNILATERAL DETERMINATION THAT, IN TENNESSEE, PUNITIVE DAMAGES CAN BE AWARDED IN AN AMOUNT THAT IS IN EXCESS OF 150 TIMES THE COMPENSATORY DAMAGE AWARD RESULTS IN THE STATE SUPREME COURT USURPING THIS COURT'S PREROGATIVE TO INTERPRET AND ESTABLISH CONSTITUTIONAL DUE PROCESS GUIDELINES 30

TABLE OF CONTENTS – Continued

Page

III. THE ISSUE IS IMPORTANT AND HAS NATIONWIDE IMPACT 35

CONCLUSION 37

APPENDIX INDEX

November 3, 2009 decision of Tennessee Supreme Court, David Goff et al. v. Elmo Greer & Sons Construction Co., Inc., No. M2006-02660-SC-RII-CV ..... App. 1

November 3, 2009 Judgment of Tennessee Supreme Court, David Goff et al. v. Elmo Greer & Sons Construction Co., Inc., No. M2006-02660-SC-RII-CV ..... App. 52

May 16, 2008 decision of Tennessee Court of Appeals for the Middle District of Tennessee, David Goff et al. v. Elmo Greer & Sons Construction Co., Inc., No. M2006-02660-COA-R3-CV ..... App. 54

November 9, 2006 Order of Circuit Court for White County, Tennessee, Honorable John A. Turnbull, Presiding, David Goff et al. v. Elmo Greer & Sons Construction Co., Inc., No. CC-320 ..... App. 83

November 9, 2006 Punitive Damages: Findings of Fact and Conclusions of Law filed in Circuit Court for White County, Tennessee, Honorable John A. Turnbull, Presiding, David Goff et al. v. Elmo Greer & Sons Construction Co., Inc., No. CC-320 ..... App. 87

TABLE OF CONTENTS – Continued

Page

July 14, 2006 Judgment on Jury Verdict filed in Circuit Court for White County, Tennessee, Honorable John A. Turnbull, Presiding, David Goff et al. v. Elmo Greer & Sons Construction Co., Inc., No. CC-320 ....App. 105

TABLE OF AUTHORITIES

Page

CASES:

Bennett v. Mueller, 322 F.3d 573 (9th Cir. 2003).....31

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).....*passim*

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).....24

Chandler v. Florida, 449 U.S. 560 (1981).....22, 37

Colautti v. Franklin, 439 U.S. 379 (1979).....23

Connally v. General Constr. Co., 269 U.S. 385 (1926).....23

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).....20, 23

Exxon Shipping Company v. Baker, 128 S. Ct. 2605 (2008).....15, 21, 27

Goff v. Elmo Greer & Sons Construction Co., Inc., 2008 Tenn. App. LEXIS 296 (Tenn. Ct. App. May 16, 2008).....12, 13

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)....20, 30

Hopkins v. Bonvicino, 2009 U.S. App. LEXIS 15689 (9th Cir. Cal. 2009).....31

Minnesota v. Nat'l Tea Co., 309 U.S. 551 (1940).....31

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991).....14, 18

TABLE OF AUTHORITIES – Continued

Page

Philip Morris USA v. Williams, 549 U.S. 346 (2007) 19, 20, 23

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 14, 20

United States ex rel. Lawrence v. Woods, 1970 U.S. App. LEXIS 6870 (7th Cir. Ill. 1970) 35

STATUTES, CONSTITUTION AND RULES:

28 U.S.C. § 1257(a) 3, 4

U.S. Constitution 3, 35

U.S. Const., amend. XIV 3, 22

United States Supreme Court Rules, Rule 10 ..... 3, 16, 17, 28, 36

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the opinion and resulting judgment of the Tennessee Supreme Court entered in this case on November 3, 2009, said judgment imposing an unconstitutionally excessive punitive damage award of $500,000 where the jury awarded compensatory damages of $3,305. In other words, the Tennessee Supreme Court approved a punitive to compensatory damage ratio of 151 to 1. No case considered by this Court has sanctioned a three-digit ratio as being constitutionally valid and not in violation of the Petitioner's due process rights; yet, this is the award rendered by the Tennessee Supreme Court in its November 3, 2009 decision. Petitioner prays that this due process violation will be reviewed and corrected by this Court.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court rendered November 3, 2009, is reported at 2009 Tenn. LEXIS 701 and is reprinted in the Appendix ("App.") at App. 1. The Judgment of the Tennessee Supreme Court is found at App. 52. The unpublished opinion and judgment of the Tennessee Court of Appeals, rendered May 16, 2008, is reported at 2008 Tenn. App. LEXIS 296 and is reprinted at App. 54. The Tennessee Circuit Court's unpublished judgment on the jury verdict, rendered July 14, 2006, is reprinted

at App. 105. The Tennessee Circuit Court's unpublished order on post-trial motions, filed November 9, 2006, is reprinted at App. 83. The Tennessee Circuit Court's unpublished "punitive damages: findings of fact and conclusions of law", filed November 9, 2006, is reprinted at App. 87.

JURISDICTION

The jury trial for this case commenced in the Circuit Court for White County, Tennessee on June 28, 2006. The verdict was rendered against Petitioner finding compensatory damages of $3,305 and punitive damages of $2,000,000, and judgment was entered by the trial court on July 14, 2006. App. 105. On November 9, 2006, the trial court entered its order on post-trial motions, App. 83, reducing the punitive award to $1,000,000, as this was the amount sued for by the Respondents. [T.R. Vol. I, pp. 82-84]

The Tennessee Court of Appeals heard Petitioner's timely appeal and rendered its decision on May 16, 2008, reversing and remanding the punitive damage award to the trial court for further consideration. App. 54.

The Respondents filed for discretionary review by the Tennessee Supreme Court and on November 3, 2009, the state supreme court rendered its unanimous opinion, reducing/modifying the punitive damage award to $500,000. App. 1.

This Petition is due to be filed on or before February 1, 2010.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RULES INVOLVED IN THIS CASE

United States Supreme Court Rules, Rule 10(c):

> A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

United States Constitution, Fourteenth Amendment, Section 1:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(a):

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Petitioner Elmo Greer & Sons Construction Company, Inc. (hereinafter Elmo Greer or Petitioner) contracted with the State of Tennessee to build a portion of Highway 111 in Sparta, Tennessee. Respondents David Goff, his wife Joyce Goff, and his mother Agnes Goff (hereinafter jointly referenced as Goffs or Respondents) own a residence and 400 acres of real property along Highway 111. The lawsuit instituted by Respondents relates to damages claimed to have occurred during the construction of a portion of Highway 111 that ran through their property, close to the residence.

Respondents' relationship with Petitioner began when David Sumner, Petitioner's project manager on this construction project, [T.R. Vol. IV, p. 765] asked to meet with the Respondents about whether they would consider allowing Petitioner to put rock and dirt on the lot across the street from their home. Petitioner was required, under the design received for the road from the Tennessee Department of Transportation (TDOT), to widen the cut in the Goff property area [T.R. Vol. IV, pp. 761-762] and there would be excess rock and dirt that they needed to place somewhere. Petitioner did the grading for a portion of the new highway, while the bridges and paving were subcontracted out to other companies. [T.R. Vol. IV, pp. 760-761]

Respondents and Petitioner agreed on using the east side of the property for a staging area and for the waste rock and dirt fill from the project. [T.R. Vol. II, p. 244; T.R. Vol. IV, p. 764] Mr. Lee Anderson, chief engineer for Petitioner [T.R. Vol. II, p. 189], drafted the contract between the parties. He also designed the waste area and submitted the design together with the parties' contract [T.R. Vol. II, p. 243], signed January 7, 1994, to the State. [T.R. Vol. IV, pp. 770-771]

The parties' contract stated that the contractor has the right to place dirt, rock and other excess material from job site on which it presently performs a construction contract with TDOT together with right of ingress and egress over and on the Respondents' lot of approximately five to seven acres. [T.R.

Vol. II, p. 251] Additionally, the contractor agreed to fill the area and to leave the lot in a neat and graded condition. [T.R. Vol. II, p. 246] This was particularly agreeable to Mr. Goff because he wanted to have the fill area be a level surface so it would be buildable. [T.R. Vol. II, p. 243; p. 247] The site was also approved by TDOT as an excess fill, from the road job, site.

Highway construction began and the Respondents felt the first blast in March 1994. The blasting was close to the Respondents' residence. Respondents testified that rocks would hit the house, windows, roof, and porch. [T.R. Vol. II, p. 77] The Respondents also believed that Petitioner had buried tires and other construction debris on the property.

Respondents filed suit alleging damages from the blasting and from burying waste debris on the property, including large waste tires, seeking damages in the amount of $1,000,000. The Respondents' complaint alleged a cause of action in nuisance and in violation of the Solid Waste Disposal Act by the creation of an environmental hazard at the site. [T.R. Vol. I, p. 1]

Testimony at trial, even from Respondents' own witness, Douglas Smith, was that the residence had been inspected after road construction was completed and that the damage was purely cosmetic, not structural. [T.R. Vol. III, p. 567]

Lee Anderson, Petitioner's chief engineer, testified that he was present at the Goff property during this

road construction project and that the Goff property was used as a waste area for excess, surplus material, including tires. [T.R. Vol. II, p. 195] However, as the tires became flat or unusable, they would stack them up on the waste area and then haul them back to Kentucky because they have value attached to them. [T.R. Vol. II, pp. 195-198; T.R. Vol. IV, pp. 641, 646-647, 773] Mr. Anderson stated that it is not part of Petitioner's practice to just dump rock, dirt, and fill on top of refuse tires. [T.R. Vol. II, p. 197]

Mr. Anderson further testified that if he had seen an Elmo Greer employee burying tires on the Goff property, the employee would have been fired on the spot for violating company policy. [T.R. Vol. IV, pp. 774-775]

The Respondents suspected that all sorts of materials had been buried on the property; therefore they called David Lloyd Shores of Shores Trucking and Excavating asking that he bring a track hoe to do some digging for them around three years prior to trial. [T.R. Vol. II, pp. 173-174] As a result of digging in the project staging area, Mr. Shores found two tires eight to nine feet down in the earth. One may have come off a rock truck and the other was more like a regular big truck tire. [T.R. Vol. II, p. 176; T.R. Vol. III, p. 374] Mr. Shores dug on the property at Respondents' request a second time shortly before trial, and he found four more tires [T.R. Vol. II, p. 180] buried eight to ten feet below the surface.

Respondents' professional geologist expert witness, Ken Johnson, testified as to whether the property was contaminated or hazardous to anyone's health. He testified that, based on his experience [T.R. Vol. III, p. 383], it would cost a minimum of $318,000 to go through the fill dirt to certify that the property was clean. However, he also specifically testified that tires are non-hazardous waste, that they do not create either an environmental hazard [T.R. Vol. III, p. 405] or a health hazard [T.R. Vol. III, p. 407], and that finding six tires on a three to five acre parcel of land did not constitute hazardous waste contamination. [T.R. Vol. III, p. 412]

Petitioner provided testimony of expert witness Ray Corn who testified regarding whether the property was hazardous subsequent to the construction project. Mr. Corn did core sampling of the Goff property to determine the existence of contamination or hazardous substances. [T.R. Vol. III, p. 580] Mr. Corn analyzed the samples for hazardous waste constituents and for petroleum products. [T.R. Vol. III, pp. 587-590]

The analysis confirmed that no contaminants were detected. [T.R. Vol. III, pp. 590-591] The site was clean and there was no hazardous material or hazardous waste on the site. [T.R. Vol. IV, p. 631] Mr. Corn testified that even though 6 tires and 2 pipes were found on this property, the site would not be considered hazardous or contaminated. [T.R. Vol. III, p. 593; T.R. Vol. IV, p. 650]

When asked if the presence of tires on Respondents' property was a violation of the Tennessee Solid Waste Disposal Act, Mr. Corn stated that the Act was not applicable to this property site. [T.R. Vol. III, p. 595] Mr. Corn further testified that the presence of some tires and pieces of pipe on real property is not a violation of the Solid Waste Disposal Act. [T.R. Vol. IV, p. 629] Tires are not solid waste pollution under Tennessee statutes. Six tires, even of large size, would be insufficient for the State of Tennessee to consider the property a waste site subject to regulation. [T.R. Vol. IV, pp. 670-671] Mr. Corn further testified that there was no indication of intentional hiding of the old tires [T.R. Vol. IV, p. 659] and there was no hazardous contamination on the site. [T.R. Vol. IV, p. 650]

Ms. Vicky Steed, an environmental engineer with the Tennessee Division of Water Pollution [T.R. Vol. IV, pp. 672-673], testified that she was on site when Mr. Goff was digging the holes looking for tires. [T.R. Vol. IV, pp. 674-675] Although there was a large and small tire discovered [T.R. Vol. IV, p. 677], Ms. Steed stated that she found nothing that was out of the ordinary upon inspection; she smelled no contaminants and saw nothing that would cause alarm. [T.R. Vol. IV, p. 680]

Mr. Christopher Green testified that he is a professional Hydrogeologist with the State of Tennessee and is also a certified hazardous waste operator. [T.R. Vol. IV, pp. 684-688] He saw two pieces of pipe and four tires on the property two weeks before trial. [T.R. Vol. IV, p. 705] He stated that the laboratory report

from those samples found nothing above acceptable standards, even on the test of the seep soil. [T.R. Vol. IV, pp. 701-702]. He also found no evidence of intentional burying of tires or other waste materials [T.R. Vol. IV, pp. 738-739], and no reason that the site would not be considered suitable for home or business construction. [T.R. Vol. IV, p. 731]

Mr. John Michael Apple, Director of Division of Solid Waste Management for the Tennessee Department of Environment and Conservation testified that after inspection and after soil sampling of the Goff property, he also did not see anything that was unusual or that required further investigation. [T.R. Vol. IV, p. 802] Regarding fines, he testified that if the State had found the site to be in violation of any regulations, significant fines could be assessed and civil penalties could be incurred up to $5,000 per day. [T.R. Vol. IV, p. 810] However, no fines or penalties were imposed as to the Goff property because nothing was unusual and no further investigation was necessary. [T.R. Vol. IV, p. 803]

Based on this testimony, the matter was submitted to the jury and a verdict was returned finding, as relevant to the issue subject of this Petition for Certiorari, as follows:

- finding liability on Respondents' nuisance claim;
- awarding $3,305 in compensatory damages;

- finding no liability for any environmental hazard; and
- finding liability for punitive damages.

The second phase of the bifurcated trial then was conducted before the same jury and additional evidence was submitted to the jury for purposes of considering the amount of punitive damages, the jury ultimately returning a punitive damage award of $2,000,000.

The trial court reviewed the testimony in its role as thirteenth juror and affirmed the compensatory damage award of $3,305. App. 83, 105. Regarding the punitive award, the trial court rendered findings of fact and conclusions of law, affirming the punitive award by exclusively referencing the Solid Waste Disposal Act (the environmental hazard claim the jury had rejected). App. 87. The trial court also reduced the punitive award to $1,000,000 because, under Tennessee procedure and precedent, Respondents cannot obtain more relief than asked for in the complaint. App. 83, 105.

Petitioner appealed the verdict and judgment to the Tennessee Court of Appeals, primarily asking for reversal of the punitive damage award. The Court of Appeals consolidated the issues as follows:

1. Whether the record supports the award of punitive damages.
2. Whether the award of punitive damages is so excessive that it is in violation of

Tennessee and federal constitutional due process.

3. Whether the trial court issued an improper jury instruction concerning punitive damages.

4. Whether the trial court erred by denying Petitioner's motion for mistrial when the Respondents introduced evidence of insurance and settlement negotiations.

Goff v. Elmo Greer & Sons Construction Co., Inc., 2008 Tenn. App. LEXIS 296, *18-19 (Tenn. Ct. App. May 16, 2008) at App. 69. The Court of Appeals reversed the award of punitive damages and remanded that issue to the trial court. App. 77-78, 82. Specifically, the Court of Appeals held:

> . . . . Construction Company argues that the trial court incorrectly relied on the environmental tort in approving the jury's award of punitive damages, because the jury rejected that cause of action and declined to award compensatory damages on that basis. We agree.

Ibid. App. 74. The Court of Appeals further wrote:

> In this case, the only claim upon which punitive damages could be based upon is the nuisance claim, as the jury found Construction Company not liable for the environmental tort. Here, the Goffs focus on the expert testimony that the cost to clean the fill area would be $318,000, and that the award of damages based on the nuisance

> claim "did not encompass the full harm the Respondents sustained. The harm to the Respondents goes beyond their legally recoverable damages." The Goffs sought in their complaint recovery of "the costs and expenses of excavating, removing, and disposal of the waste materials buried upon the property." The jury, however, declined to make such an award. The trial court stated in its findings of fact that "the jury's compensatory damages award was very modest. The evidence would have supported a verdict of over $100,000." Whatever the jury's reasoning for the "modest" award, punitive damages cannot be used to make up for a low compensatory award.
>
> The trial court's findings of fact and conclusions of law are insufficient in that they rely heavily on the environmental tort claim, a theory which the jury rejected. We therefore reverse the award of punitive damages and remand the case to the trial court. . . . Because of our holding, we need not address Construction Company's constitutional argument regarding the excessiveness of the award.

Ibid. App. 76-78. Then the Court of Appeals affirmed the trial court on the remaining issues and remanded the case for consideration of the punitive damages under the nuisance theory. *Ibid.* App. 32. While the Petitioner had argued the unconstitutionality of the jury's award as a violation of Petitioner's due process rights, even as reduced by the trial court, the

intermediate appellate court did not address that argument before remanding the case back to the trial court.

The Tennessee Supreme Court, however, accepted the Respondents' petition for discretionary appellate review and found that the trial court did not inappropriately base its decision on the existence of an environmental tort. Rather, the state supreme court held that the same facts that supported Petitioner's alleged violation of the Solid Waste Disposal Act would also support the existence and liability for a nuisance. App. 21.

The Tennessee Supreme Court then considered the issue that was pretermitted by the intermediate appellate court: that is, whether the punitive damage award violated the Fourteenth Amendment due process rights of the Petitioner because of its excessiveness.

The Tennessee Court expressly noted the decisions of this Honorable Court, from *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) App. 39-40 and *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), to *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). App. 29. However, the court did not address subsequent decisions which have continued defining constitutional parameters supporting a single-digit multiplier when considering the punitive to compensatory damage ratio.

Indeed, this Court's decision in *Exxon Shipping Company v. Baker*, 128 S. Ct. 2605 (2008) was reduced to a mere footnote reference. App. 38.[1]

The state court then stated that the trial court's $1,000,000 punitive award was unconstitutionally excessive when compared to the $3,305 compensatory award, it bearing a 302 to 1 ratio. App. 39. Although the court considered the possible civil penalties and fines for the allegedly objectionable behavior of the Petitioner, the third prong of the *BMW* analysis, the court recognized that Mr. Apple testified that no fines had been, or would be, assessed against the Petitioner based on the property at issue, and no further investigation of the property was necessary.

Ultimately, the state court decided to modify the punitive damage award to $500,000, saying that this amount is "more rationally connected" to the non-physical harm that the Respondents suffered.[2] App. 44. The state supreme court, therefore, completely ignored the fundamental question of whether a triple-digit multiplier is constitutionally authorized in the first place, the very issue that was pretermitted and,

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[1] The *Exxon* decision stated that a 1 to 1 ratio was a fair "upper limit" under maritime law for the situation involved in that case.

[2] The state court failed to acknowledge at this point that the jury heard of these "non-physical" harms and returned a compensatory award of only $3,305, clearly electing not to include this alleged damage in their award.

hence, not addressed by the decision of the intermediate appellate court. In short, the supreme court failed to explain how this "modified" award is constitutionally appropriate given that it bears a punitive to compensatory ratio of 151 to 1.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE TENNESSEE SUPREME COURT ESTABLISHING THE PUNITIVE DAMAGE AWARD WITH A MULTIPLIER OF 151 TO 1 IS IN SHARP CONFLICT WITH THE PRECEDENT OF THIS COURT AND FAR EXCEEDS THE CONSTITUTIONAL DUE PROCESS LIMITS ON PUNITIVE DAMAGES.

Rule 10 of this Court's Rules identifies the character of reasons that will be considered in a petition for writ of certiorari. At Subpart (c) the Rule states:

> A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or **has decided an important federal question in a way that conflicts with relevant decisions of this Court**. (Emphasis added)

The case under consideration in this Petition for Certiorari claims a solid position in Rule 10(c). Here, the highest court in the State of Tennessee has decided that an award of $500,000 punitive damages is not constitutionally prohibited as an excessive

fine when based on compensatory damages of $3,305. However, this 151 to 1 ratio is in direct opposition to the decisions of this court since the 1996 decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

This court granted certiorari in *BMW* to "illuminate the character of the standard that will identify unconstitutionally excessive awards of punitive damages." 517 U.S. at 568. Since that decision, this Court has considered the due process limitations on punitive damages and has failed to authorize triple-digit multipliers as constitutionally acceptable. Rather, the cases have held that a 1 to 1 ratio is always constitutionally appropriate; a single-digit multiplier of compensatory damages is also constitutionally appropriate; and a double-digit multiplier may be constitutionally appropriate if there are especially egregious circumstances. Since *BMW*, no case has found a triple-digit multiplier to be constitutionally acceptable.

Rule 10(c) mandates that this case be accepted for certiorari review.

A. FOR MORE THAN A DECADE, THE UNITED STATES SUPREME COURT HAS HELD THAT, AT MOST, A MODEST DOUBLE-DIGIT MULTIPLIER WOULD PASS CONSTITUTIONAL MUSTER WHEN APPLIED TO THE RELATIONSHIP BETWEEN PUNITIVE AND COMPENSATORY DAMAGES AWARDED BY A JURY UNDER ESPECIALLY EGREGIOUS CIRCUMSTANCES.

A review of the decisions rendered by this Court in the past decade reveals that the Court has never approved, as consistent with due process considerations or as constitutionally valid, a triple-digit multiplier for the outer range of exemplary damages. Rather, the Court has stated that even modest double-digit multipliers may push the constitutional bounds beyond legitimate due process constraints.

The reasonableness of a punitive award is tested by its relationship to the harm suffered by the plaintiff. *See BMW of North America, Inc. v. Gore, supra*; *Pacific Mutual Life Insurance Co. v. Haslip, supra.* In this Petition for a Writ of Certiorari, the compensatory damages assessed by the jury on the Respondents' nuisance claim were $3,305. Clearly, the verdict's punitive award of $2,000,000 reflects a punitive to compensatory ratio of 604 to 1; the award reduced to $1,000,000, the amount sued for, reflects a ratio of 302 to 1; and the award as "modified" by the Tennessee Supreme Court to $500,000 reflects a ratio

of 151 to 1. None of these awards have any relationship to the compensatory damages the jury awarded, and all are arbitrary and unconstitutionally excessive under the Fourteenth Amendment to the Federal Constitution.

This Honorable Court stated in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003):

> While states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. **The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.**

Id. at 416 (Emphasis added)

In *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), this Court again reviewed the procedural limitations on punitive damage awards. The *Philip Morris* jury returned a verdict of $79,500,000 in punitive damages after awarding $821,000 in compensatory damages. Thus the ratio was almost 100 to 1. Although the viability of a 100 to 1 punitive award was pretermitted due to the Court's remand on other issues, the Court reaffirmed its previous decisions as to the purposes and limits of punitive damage awards, clearly again establishing *BMW* and *State Farm* as the guides for validity under the U.S. Constitution.

> For these and similar reasons, this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as "grossly excessive". See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (requiring judicial review of the size of punitive awards); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001) (review must be *de novo*); *BMW*, *supra* at 574-585 (excessiveness decision depends upon the reprehensibility of the Petitioner's conduct, whether the award bears a reasonable relationship to the actual and potential harm caused by the Petitioner to the plaintiff, and the difference between the award and sanctions "authorized or imposed in comparable cases"); *State Farm, supra*, at 425 (excessiveness more likely where ratio exceeds single-digits).

549 U.S. at 352-353.

Respondents and the state supreme court rely on the 1993 decision in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), where the *TXO* Court was faced with a judgment against the Petitioner for $10,000,000 in punitive damages and $19,000 in compensatory damages, reflecting a ratio of 526 to 1. Petitioner submits the *TXO* decision is no longer the decisive statement from this Court as to the relationship between punitive and compensatory damages. The *TXO* decision was rendered well prior to the *BMW* decision (1996), the *Campbell* decision (2003), the *Philip Morris USA* decision (2007) or

the *Exxon Shipping Company* decision (2008). Each of these decisions have stressed the importance of the 1 to 1 or single-digit ratio, while also noting that, in truly egregious circumstances, a modest double-digit multiplier might pass constitutional scrutiny. Nowhere, since the 1993 *TXO* decision, has this Court authorized a triple-digit multiplier as constitutionally permissible under the Fourteenth Amendment.

The 151 to 1 ratio applied by the state Court in this case is an unconstitutional violation of the Petitioner's due process rights to be free from excessive fines and penalties. This is particularly true where the testimony of several witnesses, including the director of the state regulatory agency, was clear and uncontradicted:

- no fines or penalties were appropriate for the property in question;
- no fines or penalties had been imposed;
- no fines or penalties would be imposed in the future;
- the Solid Waste Disposal Act was not applicable to the property site; and, the Petitioner did not violate said Act.

[T.R. Vol. III, p. 595; IV, pp. 629, 670-671, 799 and 802]

Petitioner requests that this Court accept this Petition for Writ of Certiorari so as to declare that a triple-digit multiplier is an unconstitutional violation

of a party's due process rights where there has been no fine or penalty imposed on the Petitioner's actions at this site by any state or regulatory agency.

B. THE STATE SUPREME COURT CANNOT IGNORE CONSTITUTIONAL LIMITATIONS ON DAMAGES IMPOSED BY THE UNITED STATES SUPREME COURT.

This Court has held that it has no supervisory jurisdiction over state courts other than to evaluate the judgment in relation to the Federal Constitution. *See Chandler v. Florida*, 449 U.S. 560, 570 (1981). The words "other than" are crucial: this Court must evaluate the Tennessee Supreme Court's judgment modifying the punitive damage award to an amount bearing a ratio of 151 to 1 in light of the U.S. Constitution and the Fourteenth Amendment's due process protection. Petitioner suggests that this is the very foundation of this Petition for Writ of Certiorari.

Indeed, the Fourteenth Amendment's Due Process Clause states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." This clause of the Fourteenth Amendment to the U.S. Constitution has been construed so as to impose substantive limits on punitive damage awards.

This Court has stated that due process precludes the imposition of punishment whenever the defendant

reasonably could have concluded that its conduct was lawful. *See generally Colautti v. Franklin*, 439 U.S. 379 (1979) (statute that predicated criminal responsibility on a "complex medical judgment about which experts can – and do – disagree" was unconstitutionally vague); *Connally v. General Constr. Co.*, 269 U.S. 385, 392 (1926) (law imposing criminal penalties "should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another").

Further, these same principles apply to punishment meted out in a civil proceeding, especially as it relates to punitive damages, as recognized by this Court when characterizing punitive damages as "quasi-criminal." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). This underscores the need for due process protection against their arbitrary and standardless imposition. *Id.* at 433.

> This Court has long made clear that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." (internal citations omitted) At the same time, we have emphasized the need to avoid an arbitrary determination of an award's amount.

Philip Morris USA v. Williams, 549 U.S. at 352.

In the case subject of this Petition, the Tennessee Supreme Court made an arbitrary determination of

the amount of punitive damages to be awarded. Indeed, the evidence was uncontradicted that the Petitioner did not violate any regulation or statute and that none of its actions were illegal or subject to fine or penalty. Clearly, if due process precludes imposition of punishment when the defendant reasonably could have concluded that its conduct was lawful, the imposition of a punitive damage award when the actions of the Petitioner were, in fact, lawful is a violation of the Petitioner's due process rights and begs for this Court's scrutiny.

After considering the *BMW* guideposts for evaluation of punitive damages, the state court stated:

> In this case, the ratio of $1 million punitive damages to compensatory damages as approved by the trial judge is over 302 to 1. **This ratio is excessive in light of the circumstances presented.** As set forth above, Elmo Greer buried tires which, while constituting a nuisance, **do not constitute an environmental hazard or threaten the health or safety of any individual.** (Emphasis added) App. 41-42.

This Honorable Supreme Court has instructed state and federal courts that in determining whether the award is excessive, courts should give "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J.,

concurring in part and dissenting in part) In the case at bar, the state Court noted, but failed to give any merit to, the testimony of the Director of the enforcement agency that fines were not and would not be imposed by the State of Tennessee on the Petitioner in this case because, as noted previously, the Act does not apply to this site. Rather, the state court's decision describes the high statutory penalties of the Solid Waste Disposal Act of Tennessee, acknowledges that the "statutory" guidepost neither supports nor undermines the punitive damage award, but then doubles back to imply that the statutory penalties support the high punitive award rendered by the jury and approved by the trial court.

> Thus, the $1 million punitive award imposed upon Elmo Greer is within the civil fine range authorized by the legislature. However, Johnny Michael Apple, Director of Solid Waste Management for the Tennessee Department of Environment and Conservation, testified that no fines had been or would be imposed on Elmo Greer for this violation and that no further investigation of this property was needed. Given the apparent disparity between the sanctions authorized by the legislature and the sanctions that would, in practice, be imposed, we cannot conclude that this guidepost either supports or undermines the punitive damages awarded.
>
> In short, we have carefully considered the application of the three guideposts to the punitive damages awarded in this case. After

> doing so we are constrained to acknowledge that the punitive **award approved by the trial court is too large** given the circumstances and **does violate Elmo Greer's due process rights. We conclude that the award must be modified to $500,000**. This award sends a strong message about the serious nature of Elmo Greer's misconduct. At the same time, however, it is more rationally related to the non-physical harm suffered in this case. App. 43-44.

Notwithstanding the language used by the state court, Petitioner submits that this decision is an arbitrary award unsupported by the evidence, is grossly excessive, and is in violation of the due process rights of the Petitioner. The state supreme court noted the "disparity between the sanctions authorized by the legislature and the sanctions that would, in practice, be imposed", however the court failed to account for the fact that, as distinguished from "in practice", the reality in this case was that no sanctions were authorized or levied against the Petitioner. In short, this state court decision reflects an excessive fine levied by a court against a company 1) that was not guilty of any violation of the law, as evidenced by the uncontradicted testimony of numerous witnesses including the very state agency charged to enforce the law, 2) where the jury had rejected the environmental claim, and 3) where minimal compensatory damages awarded on the nuisance claim only.

In the course of this Court's analysis in *Exxon*, the Court stated:

> The Court's response to outlier punitive damages awards has thus far been confined by claims at the constitutional level, and our cases have announced due process standards that every award must pass. See, *e.g.*, *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003); *Gore*, 517 U.S., at 574-575, 116 S. Ct. 1589, 134 L. Ed. 2d 809. Although "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *id.*, at 582, 116 S. Ct. 1589, 134 L. Ed. 2d 809, we have determined that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," *State Farm*, 538 U.S., at 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585; "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *ibid.*

Exxon, 128 S. Ct. at 2626.

The punitive damage award will not likely pass constitutional scrutiny if there is more than a single-digit ratio between the punitive and compensatory damage award, certainly not a ratio of 604 or 302 or even 151 to 1 as imposed in this case.

Clearly, the state supreme court decision flies in the face of the punitive damage jurisprudence from this Honorable Court. This Court has stated the due process standards that every punitive damage award must meet, and it is clear that in the instant case, this standard simply is not met. This Honorable Court is authorized, and indeed is compelled, to apply the protections guaranteed by the Constitution to cases where lower courts have misapplied and abused the due process rights of the Petitioner. In this case, the punitive damage award of $500,000 based on a compensatory award of $3,305 (a ratio of 151 to 1) presents an opportunity to address the constitutional limitation on triple-digit multipliers applied to punitive damage awards.

II. THE TENNESSEE SUPREME COURT HAS SEIZED AUTHORITY FOR ITSELF THAT IS SPECIFICALLY RESERVED FOR THIS COURT.

As previously noted, Petitioner submits that this Petition for Writ of Certiorari is appropriate under Supreme Court Rule 10(c) where the state supreme court has decided an important federal question in a way that conflicts with relevant decisions of this Court. Here, the "important federal question" is whether constitutional due process rights have been violated by the imposition of an excessive punitive damage award that is in direct conflict with the numerous decisions of this Court.

A. THE STATE CANNOT CONCLUDE THAT WHAT IS DECLARED UNCONSTITUTIONAL BY THE UNITED STATES SUPREME COURT IS, NONETHELESS, ALLOWABLE UNDER THE STATE CONSTITUTION, AS ANY STATE ANALYSIS OF A CONSTITUTIONAL ISSUE IS SUBSERVIENT TO THE UNITED STATES CONSTITUTION AND ITS INTERPRETATION BY THIS COURT.

In the 2003 decision in *State Farm, supra*, this Court pointed to traditional remedies of "double, treble, or quadruple damages" and stated that "they demonstrate what should be obvious: [s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1." 538 U.S. at 425. In the case at bar, the Tennessee Supreme Court "modified" the trial court's award of punitive damages from $1,000,000 based on the $3,305 compensatory damage award, a 302 to 1 ratio, to $500,000, bearing a 151 to 1 ratio.

In short, the unanimous Tennessee Supreme Court shunned the guidance from this Court, took matters in its own hands and unilaterally determined that a ratio of 151 to 1 was appropriate under the U.S. Constitution, in clear contradiction to this Court's declaration in *State Farm* that a ratio such

as "145 to 1" did not comport with due process constraints.

The Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments." *State Farm, supra*, 538 U.S. at 416. Further, this Court has found that the U.S. Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as "grossly excessive." *See Honda Motor Co. v. Oberg, supra*. Clearly, state courts cannot ignore what this Court holds as the parameters for a constitutionally acceptable limit on punitive damages. Where the state supreme court has imposed a punitive damage award in derogation of this Court's pronouncements, the refusal to follow this Court's guidance can result in nothing other than a "grossly excessive [and] arbitrary punishment" that is in violation of the Petitioner's due process rights.

B. THE UNILATERAL DETERMINATION THAT, IN TENNESSEE, PUNITIVE DAMAGES CAN BE AWARDED IN AN AMOUNT THAT IS IN EXCESS OF 150 TIMES THE COMPENSATORY DAMAGE AWARD RESULTS IN THE STATE SUPREME COURT USURPING THIS COURT'S PREROGATIVE TO INTERPRET AND ESTABLISH CONSTITUTIONAL DUE PROCESS GUIDELINES.

This Court granted certiorari in *BMW* to "illuminate the character of the standard that will

identify unconstitutionally excessive awards of punitive damages." 517 U.S. at 568. The identification of constitutionally excessive awards of punitive damages is an issue that is squarely within the scope of the Supreme Court's jurisdiction.

> It is the federal courts that are the final arbiters of federal constitutional rights, not the state courts. See, e.g., *Bennett v. Mueller*, 322 F.3d 573, 582 (9th Cir. 2003) ("[S]tate courts will not be the final arbiters of important issues under the federal constitution." (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557, 60 S. Ct. 676, 84 L. Ed. 920 (1940))).

Hopkins v. Bonvicino, 2009 U.S. App. LEXIS 15689 (9th Cir. Cal. 2009).

This was illustrated so clearly when this Supreme Court accepted the *BMW* case for review and decision. The *BMW* decision provided lower courts three "guidelines" that were to be used in evaluating whether a punitive damage award was unconstitutionally excessive and in violation of due process rights of the defendant. Specifically, the Court stated in *BMW, supra*, 517 U.S. at 574-585 that the excessiveness of the award depends upon 1) the reprehensibility of the defendant's conduct, 2) whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and 3) the difference between the award and sanctions authorized or imposed in comparable cases.

In the case at bar, the Tennessee Supreme Court quoted these guideposts and appeared to apply them to the evidence, but then the court ignored the clear result of that analysis and arbitrarily decided the punitive damage amount in disregard of this Court's directives. Regarding the first guidepost, reprehensibility of the Petitioner's conduct, the state court held that burying tires on the Respondents' property was reprehensible conduct.[3] But, the court then also recognized that the jury found no "environmental hazard" was created by the Petitioner and also that the state found no violation of any statute or regulation. The state court then held:

> Thus, although Elmo Greer's conduct was sufficiently reprehensible for this guidepost to point toward a substantial punitive damages award, it did not rise to the highest level of reprehensibility. App. 37.

Regarding the second guidepost, whether the award bears a reasonable relationship to the actual and potential harm caused by the Petitioner to the Respondents, the state court noted that there was no hazard or threat by stating:

> As set forth above, Elmo Greer buried tires which, while constituting a nuisance, do not constitute an environmental hazard or

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[3] While the Petitioner disagrees with the award of punitive damages in any amount, for purpose of this Petition, Petitioner acknowledges but does not concede this finding of the lower courts.

> threaten the health or safety of any individual. App. 42.

Regarding the third guidepost, the difference between the award and sanctions authorized or imposed in comparable cases, the state court detailed the various penalties and fines that were possible under the relevant statutes and regulations. However, as referenced hereinabove, the court then noted that representatives from the State of Tennessee testified that no penalties or fines were appropriate and none had been, or would be, issued against the Petitioner. Surely, the potentiality of fines and penalties cannot satisfy this guidepost if there is affirmative testimony that the site has been inspected and that no fines would be imposed under the relevant circumstances. As to this guidepost, the state supreme court stated:

> Given the apparent disparity between the sanctions authorized by the legislature and the sanctions that would, in practice, be imposed, we cannot conclude that this guidepost either supports or undermines the punitive damages awarded. App. 44.

Notwithstanding the clear fact that none of the three guideposts pointed to a significant punitive damage award, the state court then continued to state:

> In short, we have carefully considered the application of the three guideposts to the punitive damages awarded in this case. After doing so we are constrained to acknowledge that the punitive award approved by the

> trial court is too large given the circumstances and does violate Elmo Greer's due process rights. We conclude that the award must be modified to $500,000. This award sends a strong message about the serious nature of Elmo Greer's misconduct. At the same time, however, it is more rationally related to the non-physical harm suffered in this case. App. 44.

Petitioner submits that the three *BMW* guideposts do not support a finding of extreme, reprehensible conduct sufficient to take this case out of the single-digit multiplier category of cases. This is evidenced by the supreme court's statement that the Petitioner's actions were not the "highest level of reprehensibility," App. 37, that Petitioner's actions "do not constitute an environmental hazard or threaten the health or safety of any individual," App. 41-42, and that the third guidepost neither "supports [n]or undermines the punitive damages awarded." App 44. After making these statements, irrespective of the state court's conclusion as to each of the separate *BMW* guideposts, the state court arbitrarily decided to award $500,000 punitive damages on a $3,305 compensatory award, a mathematical ratio of 151 to 1.

> The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal.

United States ex rel. Lawrence v. Woods, 1970 U.S. App. LEXIS 6870, 8-9 (7th Cir. Ill. 1970).

Petitioner submits that this Court has jurisdiction to consider whether triple-digit multipliers are constitutionally appropriate in the first instance, and, if appropriate, whether such ratio is applicable where the evidence does not find reprehensibility in the extreme. Petitioner asserts that these questions have been answered by this Court's decisions since the *BMW* decision established the guideposts. Specifically, as stated in *State Farm, supra*, rare is the case where the one to one ratio is insufficient for a punitive damage award, and, in that exceptional case, the U.S. Constitution may allow a minimal double-digit multiplier. The Tennessee Supreme Court erred when it authorized a punitive damage award bearing a 151 to 1 ratio to the compensatory damage jury award. This error has constitutional ramifications as it renders the decision an unconstitutional violation of the Petitioner's due process rights.

III. THE ISSUE IS IMPORTANT AND HAS NATIONWIDE IMPACT.

At the outset, it could appear that this is one renegade decision from the Tennessee Supreme Court and that it affects only this Petitioner and none else. The reality is, however, that this unanimous decision is from the highest court in Tennessee and its decisions are binding on all courts in the State of Tennessee. Furthermore, there is no guidance to Tennessee

trial or appellate courts expressing why the 301 to 1 ratio is unconstitutional while the 151 to 1 ratio is not. This decision is in blatant disagreement with other precedents of this Court and it is for this reason that this Court's Rule 10(c) authorizes appellate review in this situation.

Tennessee trial and appellate courts are bound by the pronouncement of the Tennessee Supreme Court and, if this decision is left as published, will be guided by an unconstitutional standard for future case applications. The citizens of Tennessee should not be subject to arbitrary awards which are unpredictable, which are unsupported by pronouncement of this Court, and which are unconstitutional.

Moreover, the effect of this decision is to place Tennessee federal district courts, applying Tennessee law in diversity situations, in the untenable position of having a state supreme court decision that conflicts with decision of the United States Supreme Court, the Court under whose control the federal district and circuit courts abide. Where the state has a standard different than the federal court for acceptable constitutional punitive damage awards, forum shopping will be rampant. Further, although somewhat speculative, it is entirely likely that the eight (8) states surrounding Tennessee will be urged to adopt the same punitive standards that are available to litigants in their neighbor state, whether or not that standard complies with this Court's pronouncement on the issue.

Petitioner recognizes that, generally, the United States Supreme Court has no supervisory jurisdiction over state courts; but, this Court does have jurisdiction over state court actions with respect to decisions regarding the U.S. Constitution. This Court has the ability, the obligation and the power to evaluate the state court judgment in relation to the precepts found in the U.S. Constitution. *See Chandler v. Florida*, 449 U.S. at 570. The issue brought to this Court in this Petition for Writ of Certiorari is important, although narrow. The Tennessee Supreme Court and all the trial and appellate courts beneath its jurisdiction are now in a position where the relationship of punitive to compensatory damages is unsettled, to be sure. What is the reasonable ratio, and how much can the punitive damage be before it becomes an excessive, arbitrary and unconstitutional award? Absent guidance from this Court, the citizens of Tennessee are subject to unconstitutional, overreaching, arbitrary punitive damage awards, to the detriment of this Petitioner and others similarly situated.

CONCLUSION

The case at issue in this Petition for Writ of Certiorari presents a compelling need for this Court to address the constitutionality of triple-digit multipliers when applied to the punitive damages awarded in civil litigation. Petitioner urges this Court to accept this Petition for Writ of Certiorari so as to

direct the Tennessee Supreme Court to apply this Court's analysis to the case at bar and to reduce the punitive damage award so that it is subject to a single-digit multiplier or, alternatively, to remand the case for determination of a constitutionally appropriate punitive damage award.

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
June 2, 2009 Session

DAVID GOFF et al. v.
ELMO GREER & SONS
CONSTRUCTION CO., INC.

Appeal by permission from the Court of Appeals, Middle Section
Circuit Court for White County
No. CCC-320 John A. Turnbull, Judge

No. M2006-02660-SC-R11-CV –
Filed November 3, 2009

The owners of real property filed suit against a construction company hired by the State of Tennessee to widen a highway adjacent to their property. The property owners had a contract with the construction company that allowed it to place equipment and construction materials on their land in exchange for compensation. Following the completion of the road project, the property owners filed suit claiming that the construction company failed to pay the amount due under the contract and caused blasting damage to their house and vehicles. They also claimed that the construction company illegally buried debris on their property. At trial, the parties stipulated that the construction company was liable for breach of contract in the amount of $5,355.50. A jury then determined that the construction company was strictly

liable for harm caused by its blasting activities in the amount of $9,510, and that burying debris on the plaintiffs' property constituted a nuisance for which the company was liable for $3,305. The jury also returned an award of $2 million in punitive damages which the trial court modified to $1 million to conform to the amount requested in the pleadings. The Court of Appeals affirmed the trial court's judgment as to liability, but reversed the award of punitive damages based on a finding that the trial court improperly considered Tennessee's environmental laws in approving the award. After careful review, we conclude that the evidence supports the jury's award of punitive damages and that the trial court properly considered Tennessee's environmental statutes in approving that award. We further conclude that the amount of the punitive damages award does violate the construction company's due process rights and must be modified to $500,000. Finally, we find no error in the trial court's instructions to the jury regarding punitive damages or its denial of a motion for mistrial based on a mention of insurance during the trial. Accordingly, the decision of the Court of Appeals is reversed and the judgment of the trial court is reinstated as modified.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Reversed; Judgment of the Trial Court Reinstated as Modified

CORNELIA A. CLARK, J., delivered the opinion of the court, in which JANICE M. HOLDER, C.J., and GARY R. WADE, WILLIAM C. KOCH, JR., and SHARON G. LEE, JJ., joined.

John C. Knowles, Sparta, Tennessee, Jon E. Jones, Cookeville, Tennessee, and John P. Pryor, Smithville, Tennessee, for the appellants, David Goff, Joyce Goff, and Agnes Goff.

Linda J. Hamilton Mowles, Knoxville, Tennessee, for appellee, Elmo Greer & Sons Construction Co., Inc.

OPINION

Factual & Procedural History

David Goff and his mother, Agnes Goff, own 400 acres of pasture and timber land adjacent to Highway 111 in Sparta, Tennessee. Mr. Goff and his wife, Joyce Goff, reside in a house they built on the property in 1978. As a result of highway development projects, including the project at issue in this case, the Goffs' home is encircled by four lanes of Highway 111 to the front of their house and four lanes to the rear of their house.

In 1993, the State of Tennessee contracted with Elmo Greer & Sons Construction Company, Inc. ("Elmo Greer") to widen from two to four lanes the

portion of Highway 111 adjacent to the Goffs' property.[1] Realizing that extensive blasting would be required and that the project would produce excess dirt and rock, Elmo Greer, on January 7, 1994, contracted with the Goffs to place the excess material on a portion of their land consisting of five to seven acres ("fill area"). Elmo Greer agreed to pay the Goffs ten cents per cubic yard of fill material placed on their property. Elmo Greer further agreed that the fill area would be left in a "neat and graded condition," a point of particular concern to the Goffs because they hoped to have a suitable building site when construction on the highway was completed.

Construction on Highway 111 lasted approximately three years. Starting in 1994, Elmo Greer blasted extensively the area around Highway 111, sometimes within 150 feet of the Goffs' home, and placed excess dirt and rock on their property. Rock from the blasting damaged the Goffs' vehicles and the roof of their house and nearly hit one of their children. During the construction process, Mr. Goff periodically visited the fill area of his property and became concerned with Elmo Greer's business practices. Mr. Goff noticed large motor oil deposits in

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[1] Elmo Greer, which is based in Kentucky, is described in the record as a "heavy highway construction company" that builds highways, dams, and bridges. At the time of trial, Elmo Greer had at least twenty major projects going on in ten different states, including projects in Tennessee. The State of Tennessee paid the company approximately $13 million for its work on Highway 111.

the area where Elmo Greer staged its equipment. He described "large areas" of the ground that were "black" with oil and grease where Elmo Greer repaired and changed the oil on its equipment and vehicles. He also noticed that the fill area was being used to store tires, batteries, other vehicle parts, fifty-five gallon oil drums, and other items. When Mr. Goff questioned Elmo Greer's onsite personnel about the condition of the fill area he was repeatedly told "not to worry about it" and "we'll clean it up."

Unsatisfied with these reassurances, Mr. Goff began taking pictures of the fill area, focusing on several large tires buried beneath large rocks. According to Mr. Goff, there were four or five "huge" tires that had "big rocks" on them. He testified that "in seeing that, you know, you wouldn't think they'd dump [big rocks] on [the tires] and then take [the big rocks] off and haul the tires off. So, I – I got my camera and I made pictures." Mr. Goff also focused his attention on boxes, pipes, oily rags, oil drums piled in the fill area, and other discarded waste.

Upon completing the construction project in 1997, Elmo Greer removed its equipment from the Goffs' property and compacted, graded, and seeded the fill area. Elmo Greer did not, however, compensate the Goffs for the fill material placed on their land as provided for in their agreement, prompting the Goffs to file suit for breach of contract. The Goffs also claimed in their suit that Elmo Greer was strictly liable for blasting damage to their house and

vehicles, and further that Elmo Greer had unlawfully buried discarded waste on their property.

Convinced that Elmo Greer had buried tires and other materials on his land, Mr. Goff paid Lloyd Shores Trucking and Excavating ("Lloyd Shores") $3,305 to twice dig up a small portion of the fill area. During the first dig, Lloyd Shores unearthed one large tire, eight feet tall and weighing at least one ton, and a smaller tire described as a regular truck tire. These tires were buried eight to nine feet deep under a layer of compacted rocks, some of which were the size of a pick-up truck. During the second dig, Lloyd Shores unearthed some steel pipes and four more tires of various sizes. It is undisputed that these items were in the fill area of the Goffs' property.

After discovering buried solid waste on their land, the Goffs amended their complaint by alleging that Elmo Greer

> did willfully, unlawfully, intentionally, and fraudulently deposit, bury, hide and conceal upon [the Goffs'] real property . . . waste materials, used oil, petroleum, truck tires, huge earth-moving tires and other waste materials that are prohibited to be disposed of in such manner by the laws of the State of Tennessee . . . all without proper and lawful permitting and all without the consent or approval of the [Goffs].

The amended complaint sought $250,000 in compensatory damages and $1 million in punitive damages. The Goffs subsequently amended their complaint a

second time, adding a nuisance cause of action claiming that Elmo Greer

> commit[ted] acts of nuisance . . . by spilling upon the property oil and petroleum products and by burying and concealing trash, garbage, waste products, rubber tires, oil filters, used and discarded machinery parts, all without permission or authorization of the [Goffs] and did thereby create an unauthorized, unlicensed, and prohibited landfill.

This second amended complaint sought $500,000 in compensatory damages and $1 million in punitive damages.

The Goffs' discovery of buried solid waste in the fill area of their land prompted Elmo Greer to conduct its own investigation by hiring AquAeTer, Inc. to conduct an environmental site assessment. AquAeTer, Inc. took soil samples from the fill area and analyzed the samples "for hazardous materials, hazardous constituents, [and] any chemicals that may have been involved with any operations that were held on the site." The test results revealed "no hazardous materials or hazardous waste" in the fill area.

A three-day jury trial commenced on June 28, 2006. Mr. Goff testified about the pictures he had taken of the fill area and the debris unearthed from his land. He testified about seeing the oil spills, batteries, vehicle parts, fifty-five gallon oil drums, and other items stored on his property. He also

related how he had repeatedly questioned Elmo Greer about the condition of the fill area and how he sought assurances that nothing but rock and dirt would be buried on his land. He specifically told Elmo Greer not to bury the "huge tires" he had seen. Elmo Greer's personnel repeatedly told him "not to worry about it" and "we'll clean it up." Mr. Goff nonetheless remained concerned that the waste materials he had seen would be buried.

Ken Johnson, a geologist, testified that the only way to certify that the fill area was free of solid or hazardous waste would be to excavate the entire 53,555 cubic yards of fill area at an estimated cost of $318,000. Mr. Johnson testified that because six tires were unearthed in the fill area, he would only certify the property as clean after the entire area was excavated. With regard to hazardous waste, Mr. Johnson stated that excavation would not be necessary for him to certify the property because the soil samples taken from the fill area did not reveal the presence of any such waste. Mr. Johnson also testified that, given their size, the buried tires could not have been accidentally covered up, noting that it had to be a conscious and intentional act to bury them. He did not recommend excavating the property to remove the tires because tires do not cause a health concern and do not deteriorate to the point of contaminating the soil. Mr. Johnson testified that while tires are not considered a hazardous waste, tires do cause an environmental concern, noting that "there are guidelines against improperly dumping [tires]."

William Parrish, a real estate appraiser, testified that the fill area was worth $10,000 an acre assuming it was free from any buried solid waste. If the property did have solid waste on it, Mr. Parrish testified that it would be worth zero because latent defects, such as buried solid waste, would have to be disclosed to a potential buyer. Based on the size of the fill area and the cost per cubic yard to excavate, Mr. Parrish testified that it would cost approximately $375,000 to "cure" the fill area of any latent defects.

Michael Corn, an environmental engineer with AquAeTer, Inc., testified that there were "no hazardous materials or hazardous waste" in the fill area. He stated that "tires are not hazardous waste or hazardous materials." Mr. Corn also testified that with soil sampling, solid waste – such as a tire – would only be discovered if the probe inserted into the ground happened to make direct contact with the solid waste. He noted that the soil assessment conducted on the Goffs' property was only "looking for hazardous waste and hazardous materials." Based on the results of that assessment, Mr. Corn believed that it was unnecessary to excavate the fill area or conduct more testing. He also stated his view that a few tires and pipes buried on private property would not create a "problem with the Solid Waste Disposal Act." Mr. Corn agreed, however, that pursuant to the Solid Waste Disposal Act, waste tires should not be buried in landfills but, instead, should be stored until they can be "transported to an appropriate facility to be used for an improved beneficial end use." He also

agreed that the Goffs' property was not a designated landfill which could store tires.

Terry Evans, a real estate appraiser hired by Elmo Greer, testified about the value of the Goffs' property at the time of trial. Mr. Evans explained that, after reviewing the soil assessment report, the photos of the fill area, and the unearthed tires and pipes, he saw nothing to indicate that the fill area was contaminated. He stated, however, that a potential buyer "might use this information to leverage a little better deal and might ask that the sale price be lower maybe 3, 5 percent, maybe a little bit lower."

Lee Anderson, Elmo Greer's chief engineer and project manager, testified that he visited the construction site once or twice a month. When asked about the use of the fill area during the construction process, Mr. Anderson testified that the area was used to change the oil on Elmo Greer's equipment. According to Mr. Anderson, company policy required that used oil be placed in fifty-five gallon drums and sent to Elmo Greer's headquarters in Kentucky where it is recycled and used to heat their offices. As to tires, Mr. Anderson conceded that tires were stacked in the fill area during construction, but explained that once enough tires were stacked they were taken to Elmo Greer's headquarters to determine whether they could be retreaded. If not, the tires were shredded and sent to a landfill. Mr. Anderson testified that there is a financial cost associated with disposing of tires in a landfill.

After Elmo Greer completed its work, Mr. Anderson inspected the Goffs' property and observed tires lying on the fill area. He "called the shop and told them to come pick up the equipment, tires, and other surplus equipment." When asked about the six tires found buried in the fill area, Mr. Anderson testified, "I have no idea. . . . It makes sense that [the tires found] were ours but I don't know that. They could be [Mr. Goff's tires]." He did admit, however, that Elmo Greer used tires like those unearthed from the fill area. He also testified that the company went through "hundreds" of tires over the course of the project because "limestone rock punches holes in them and wears them out." When asked why Elmo Greer had policies regarding what to do with used oil and tires, Mr. Anderson responded that it was "good business to meet the regulations and requirements. There's no question as to what we're supposed to do and how we're supposed to do it." He acknowledged that Elmo Greer is obligated to follow "state and federal regulations."

Johnny Michael Apple, Director of the Division of Solid Waste Management for the Tennessee Department of Environment and Conservation, testified that, other than some tires needing "to be properly disposed of," there was nothing unusual "that would indicate [the need for] further investigation." He agreed, however, that discarded whole tires are solid waste and that solid waste is not permitted to be buried outside of an approved landfill and that doing so violates state law. Mr. Apple explained that

lawfully disposing of a tire requires shredding it. He also acknowledged that one who improperly disposes of solid waste is subject to a civil penalty of up to $5,000 per day for each violation. *See* Tenn. Code Ann. § 68-211-117(a)(1) (2006). Finally, when presented with a hypothetical scenario that tires were discovered eight to ten feet below ground buried underneath heavy limestone rock and asked whether these facts demonstrated an intent to bury tires, Mr. Johnson agreed that those facts "would show that someone was trying to hide those [tires]."

Following the close of the proof, the trial court instructed the jury on the claims of "environmental tort," nuisance, and strict liability for blasting. On a special verdict form, however, the jury was asked to determine whether Elmo Greer had caused an "environmental hazard" to the Goffs' property. The phrase "environmental hazard" was not defined in the charge. Elmo Greer stipulated that it was liable for breach of contract in the amount of $5,355.50, thus resolving the Goffs' contract claim.[2] Regarding the Goffs' strict liability claim, the jury found that Elmo Greer was strictly liable for the blasting damage to their residence and vehicles and awarded $9,510 in damages.[3] The jury also found that while Elmo Greer had not caused an "environmental hazard" on the Goffs' land, it determined that Elmo

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[2] This portion of the judgment is not at issue on appeal.

[3] No issue has been raised on appeal regarding this award.

Greer had created a nuisance and awarded $3,305 in compensatory damages. The jury also determined that the Goffs were entitled to punitive damages.

During the second phase of the trial to consider the amount of punitive damages, Mr. Anderson, Elmo Greer's chief engineer and manager of the Highway 111 project, was the only witness to testify. He testified that Elmo Greer had a net worth of over $46 million for the year 2000; $50 million for the year 2001; $51 million for the year 2002; and $54.3 million for the year 2003. He also reiterated that Elmo Greer's policy "is to return . . . tires to [the home office] because you have to put [the tires] on a machine to see if [they] can be sectioned or recapped. You can't tell on a job." Mr. Anderson also testified that Elmo Greer would have been subject to penalties under its contract with the State, including losing the right to continue with the project or not receiving payment for the project, had Elmo Greer been caught burying tires.

Following Mr. Anderson's testimony and further instructions from the court, the jury awarded $2 million in punitive damages. Elmo Greer subsequently moved for a mistrial based on a mention of insurance during the trial. The trial court denied the motion. Elmo Greer also filed a motion to alter or amend the judgment or for a remittitur of the punitive damages award. The trial court modified the award of punitive damages to $1 million to conform to

the amount the Goffs sought in their complaint,[4] but otherwise denied Elmo Greer's motion to alter or amend. The trial court approved the punitive award after analyzing the factors the jury was instructed to consider under *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901-02 (Tenn. 1992).

The Court of Appeals reversed the award of punitive damages, concluding that the trial court erroneously relied on Tennessee's environmental statutes in affirming the award given the jury's finding that Elmo Greer had not committed an environmental hazard. The Court of Appeals thus remanded the case to the trial court to reconsider the award of punitive damages based on the nuisance theory alone. The intermediate court did not address whether the award violated Elmo Greer's due process rights.

The Goffs have appealed to this Court, asserting that the Court of Appeals erred in remanding the case to the trial court to re-evaluate the punitive damages award considering only the nuisance claim to the exclusion of Tennessee's environmental laws. The Goffs assert that the same facts support both the environmental tort and nuisance claims and, therefore, the trial court properly considered Tennessee's environmental statutes in upholding the punitive award. Elmo Greer responds that the Court of

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[4] *See Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326, 328-29 (Tenn. 1996).

Appeals correctly determined that the trial court erred in considering Tennessee's environmental laws in affirming the punitive award and, in any event, no material evidence exists to support an award of punitive damages. Further, Elmo Greer maintains that the trial court gave incorrect jury instructions regarding punitive damages and that the amount of the award is excessive. Finally, Elmo Greer argues that the trial court erred by denying its motion for a mistrial based on the trial court's mention of insurance during the trial.

Analysis

I. "Environmental Tort" & "Environmental Hazard"

As a threshold matter, we are compelled to address a source of significant confusion in this case stemming from the use of the term "environmental tort" in the jury instructions. The Goffs' original complaint did not refer to or allege any "environmental tort." Instead, it alleged that Elmo Greer, "in violation of environmental laws," buried refuse and other objects on the Goffs' property without their permission. The Goffs' first amended complaint alleged that Elmo Greer intentionally buried and concealed waste prohibited by state and federal law, but it likewise did not explicitly state a cause of action for "environmental tort." In their second amended complaint, the Goffs added a nuisance claim alleging that the spilling of oil and petroleum products and the burying

and concealment of trash and tires constituted a nuisance. This complaint, like the other complaints, did not allege an "environmental tort."

The first mention of "environmental tort" in the record comes not from the pleadings filed by the Goffs, but from Elmo Greer's trial brief which stated that the Goffs sought to recover for an "environmental tort and nuisance caused by environmental tort." A special verdict form proposed by Elmo Greer requested that the jury decide four causes of action – breach of contract, strict liability, "environmental hazard," and nuisance. There was no request by Elmo Greer to charge the jury on a cause of action for "environmental tort,"[5] yet that is precisely what happened.[6] Compounding the confusion, the jury was

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[5] The record does not reflect what jury instructions were requested by the Goffs.

[6] The trial court's instruction on "environmental tort" provided in part:

Environmental Tort

> It is unlawful to dispose of solid waste in violation of the *Solid Waste Disposal Act of the State of Tennessee*. No solid waste processing facility or disposal facility or site in any political subdivision of this state shall be operated or maintained by any person unless such person has registered with the Commissioner in the name of such person for the specified facility or site.
>
> Whole waste tires, lead acid batteries, and used oil must be disposed of in a State approved site.
>
> It is unlawful to construct, alter or operate a solid waste processing or disposal facility or site in

(Continued on following page)

provided a verdict form containing the four causes of action proposed by Elmo Greer, including the question, "do you find that [Elmo Greer] caused an *environmental hazard* to the Goff property?"[7] (Emphasis added). The phrase "environmental hazard" was not defined in the jury instructions. Instead, there was the instruction on "environmental tort." This instruction was then followed by a separate instruction on nuisance,[8] along with a description of the damages that could be awarded for "a nuisance . . . by virtue of

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violation of the rules and regulations or orders of the Commissioner or in such a manner as to create a public nuisance; or to dispose of solid waste in land not designated and approved as a solid waste site.

[7] Although the proposed special verdict form submitted by Elmo Greer was made part of the record, the actual verdict form submitted to the jury is not part of the record. However, we have derived its language and the responses of the jury from the actions of the trial judge in reading the questions aloud after the jury returned its verdict.

[8] As to nuisance, the jury was instructed as follows:

A nuisance is an unreasonable or unlawful use of property that results in material or substantial annoyance, inconvenience, discomfort, harm, or injury to the [Goffs], or the [Goffs'] free use, possession, or occupation of the [Goffs'] own property. . . . A nuisance extends to everything that endangers health or life, offends the senses, or obstructs the reasonable and comfortable use of property. The standard for determining whether a particular use of property is a nuisance is it's [sic] effect upon persons of ordinary health and sensibilities, and not upon those who are unusually sensitive or peculiarly susceptible to the thing complained of.

an environmental tort." The jury determined that Elmo Greer did not commit an "environmental hazard" which, again, was never defined.

Against this unusual and confusing backdrop, we note that Tennessee, recognizing the dangers inherent in hazardous waste, has adopted several statutory schemes addressing that topic. For example, the Tennessee Hazardous Waste Management Act of 1977, Tenn. Code Ann. §§ 68-212-101-121 (2006 & Supp. 2009), defines hazardous waste as that which may "(A) [c]ause, or significantly contribute to an increase in mortality or an increase in serious irreversible illness or incapacitating reversible illness; or (B) [p]ose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed." *Id.* § 68-212-104(8).[9] The Act, which regulates the storage, transportation, treatment, and disposal of hazardous waste, *see id.* § 68-212-102(1), provides that criminal and civil penalties may be imposed upon one who violates its provisions, *see id.* § 68-212-114(a), (b), (c). The Act does not, however, specifically provide for the filing of an action by a private individual who alleges harm based on another's violation of the Act. Rather, the Act provides that "[a]ny person qualified by law" may intervene in an action brought by regulatory officials

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[9] Effective June 25, 2009, subsection (8) became subsection (9). *See* 2009 Tenn. Pub. Acts ch. 531, §§ 7, 63.

charged with enforcing the Act, *see id.* § 68-212-114(d), and it allows an individual to file a complaint with regulatory officials against an alleged violator, *id.* § 68-212-117(a). Further, "any citizen" has the right to intervene on the ground that the penalties or remedies imposed by regulatory officials are inadequate or are based on erroneous findings of fact. *Id.* § 68-212-114(e)(3)(B).

Tennessee also has the Hazardous Waste Management Act of 1983, Tenn. Code Ann. §§ 68-212-201-227 (2006 & Supp. 2009), which likewise imposes civil and criminal penalties for violating its provisions, *id.* § 68-212-213. This Act gives regulatory officials supervision over enforcement and gives citizens rights to intervene similar to those granted under the 1977 Act. *See id.* § 68-212-215.

There is also the Tennessee Hazardous Waste Reduction Act of 1990, Tenn. Code Ann. §§ 68-212-301-312 (2006 & Supp. 2009), which creates additional rules and regulations and imposes an additional civil penalty of up to $10,000 for each day a violation of the Act continues. *Id.* § 68-212-309. No specific right of individuals to intervene is provided for in the Hazardous Waste Reduction Act of 1990.

In addition to the various hazardous waste acts, the legislature adopted in 1969 the Tennessee Solid Waste Disposal Act, Tenn. Code Ann. §§ 68-211-101-124 (2006 & Supp. 2009), which defines "solid waste" as including

> garbage, trash, refuse, abandoned material, spent material, byproducts, scrap, ash, sludge, and all discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, and agricultural operations, and from community activities. Solid waste includes, without limitation, recyclable material when it is discarded or when it is used in a manner constituting disposal.

Id. § 68-211-103(8). The Solid Waste Disposal Act, like the statutes dealing with hazard waste, provides for criminal and civil penalties for a violation of its provisions. *See id.* §§ 68-211-114 & -117. Although the Solid Waste Disposal Act would apply to circumstances like the burial of tires on private property, our courts have recognized that it does not provide a private right of action for persons harmed by a violation of its provisions. *See Wayne County v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 283 (Tenn. Ct. App. 1988). Instead, such persons may seek redress under other legal theories, such as nuisance. *Id.* Furthermore, in appropriate cases, a cause of action for trespass, negligence, or strict liability could be brought.

Given the language of these various environmental laws, along with prior cases addressing the Solid Waste Disposal Act itself, it is unclear to this Court why the jury was instructed on "environmental tort." Arguably, the Goffs lacked standing to bring any such claim. However, since the jury did not find the existence of any environmental tort and the issue

has not been raised by either side on appeal, it is unnecessary for us to decide at this time whether a private right of action exists for a claimed violation of the state's environmental statutes. We merely observe at this point that the same facts supporting a violation of the Solid Waste Disposal Act can constitute a nuisance, as found by the jury in this case.

II. The Punitive Damages Award

As indicated above, after finding that Elmo Greer created a nuisance, the jury awarded $2 million in punitive damages. The trial court modified the award to $1 million to conform to the amount the Goffs sought in their complaint. Elmo Greer attacks the modified punitive damage award on four grounds. First, Elmo Greer asserts that the evidence is insufficient to support any award of punitive damages. Second, Elmo Greer argues that the trial court erred in considering Tennessee's environmental statutes in affirming the punitive damage award. Third, Elmo Greer argues that the amount of the punitive award is excessive to the point that it violates due process under standards adopted by the United States Supreme Court in *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996), and its progeny. And fourth, Elmo Greer contends that, because the Goffs pled only intentional and fraudulent conduct, the trial court erred when it instructed the jury that intentional or reckless conduct can form the basis for punitive damages and further erred in failing to instruct the

jury that punitive damages are proper only in egregious circumstances. We address each of these arguments in turn.

A. Sufficiency of the Evidence Supporting Punitive Damages

Compensatory and punitive damage awards serve vastly different purposes. Compensatory damages are intended to compensate an injured plaintiff for personal injury or property damage and thereby make the plaintiff whole again. *Hodges,* 833 S.W.2d at 902. In contrast, punitive damages are intended to "punish a defendant, to deter him from committing acts of a similar nature, and to make a public example of him." *Huckeby v. Spangler,* 563 S.W.2d 555, 558-59 (Tenn. 1978). Punitive damages are thus appropriate only in the most egregious cases and, consequently, a verdict imposing such damages must be supported by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly. *Hodges,* 833 S.W.2d at 901. Evidence is clear and convincing when it leaves "no serious or substantial doubt about the correctness of the conclusions drawn." *Id.* at 901 n.3. In other words, the evidence must be such that the truth of the facts asserted be "highly probable." *Teter v. Republic Parking Sys., Inc.,* 181 S.W.3d 330, 341 (Tenn. 2005).

In this case, the jury found that the Goffs had proven by clear and convincing evidence that Elmo

Greer was "guilty of egregious, intentional or reckless acts" and thus punitive damages were warranted. Elmo Greer asserts that the record does not support the jury's conclusion and therefore the punitive damage award should be reversed in its entirety. We thus review the record to determine whether there is material evidence to support the jury's finding that there is no serious or substantial doubt that Elmo Greer acted intentionally[10] or recklessly.[11] *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 532 (Tenn. 2008).

The jury had evidence before it that the tires discovered on the Goffs' property were buried eight to nine feet deep under a layer of compacted rocks, some of which were the size of a pick-up truck. One of these tires was eight feet tall and weighed at least one ton. It is undisputed that the tires, along with the steel pipes, were unearthed in the fill area of the Goffs' property. Ken Johnson, the geologist who testified for the Goffs, stated that given their size the buried tires could not have been accidentally covered up, noting that it had to be a conscious and intentional act to

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[10] A person acts intentionally when "it is the person's conscious objective or desire to engage in the conduct or cause the result." *Hodges*, 833 S.W.2d at 901.

[11] A person acts recklessly when the person "is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." *Hodges*, 833 S.W.2d at 901.

bury them. One of Elmo Greer's witnesses, Johnny Michael Apple, likewise testified that "someone was trying to hide those [tires]." Accordingly, the jury heard witnesses proffered by both parties asserting that the only way to bury large tires eight or nine feet underground would be to do so intentionally. Further, the jury had before it the testimony of Mr. Goff that he repeatedly questioned Elmo Greer's employees about the condition of the fill area and how he sought assurances that nothing but rock and dirt would be buried on his land. He specifically told Elmo Greer not to bury the tires he had seen. Elmo Greer's personnel repeatedly told him "not to worry about it" and "we'll clean it up." The tires were nonetheless buried. Although Elmo Greer's chief engineer, Mr. Anderson, refused to acknowledge that the unearthed tires belonged to Elmo Greer or that Elmo Greer buried the tires, we are persuaded that the jury reasonably concluded that Elmo Greer acted intentionally, or at least recklessly, in burying the tires.

Additionally, the evidence demonstrated that there are strong public policy reasons against burying waste tires and that Elmo Greer was aware of these policies. Mr. Anderson testified that Elmo Greer was obligated to follow "state and federal regulations" and that the company would have been subject to penalties under its contract with the State had Elmo Greer been caught burying tires. Elmo Greer nonetheless buried the tires and subsequently showed no remorse for doing so. In fact, Elmo Greer proffered testimony from several witnesses that downplayed

the significance of burying the tires. The public policy of this State, however, suggests that inappropriately burying even one waste tire is one too many, subjecting the violator to potentially significant financial penalties, i.e., up to $5,000 per day. *See* Tenn. Code Ann. § 68-211-117(a)(1). The record also indicates that properly disposing of the waste tires would have cost Elmo Greer money. The jury could have reasonably concluded that Elmo Greer intentionally buried the tires to avoid this expense. Viewing these circumstances as a whole, we have no difficulty finding that the record contains material evidence supporting the jury's finding by clear and convincing evidence that Elmo Greer acted intentionally or recklessly.

B. Consideration of the State's Environmental Laws

Once a jury awards punitive damages, the trial court must review the award to ensure that the wrongdoer's conduct rose to the level where punitive damages are appropriate. *Hodges,* 833 S.W.2d at 902. The trial court thus reviews the evidence to consider whether the jury's findings are supported by clear and convincing evidence and whether the punitive award effectively punishes and deters the defendant from committing the same acts in the future. To guide trial courts in this review, we have identified a number of relevant factors:

(1) The defendant's financial affairs, financial condition, and net worth;

(2) The nature and reprehensibility of defendant's wrongdoing, for example

(A) the impact of defendant's conduct on the plaintiff, or

(B) The relationship of defendant to plaintiff;

(3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;

(4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;

(5) The expense plaintiff has borne in the attempt to recover the losses;

(6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;

(7) Whether, and the extent to which, defendant has been subjected to previous punitive damages awards based upon the same wrongful act;

(8) Whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and

> (9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Hodges, 833 S.W.2d at 901-02.

Analyzing these factors in great detail, the trial court concluded that clear and convincing evidence demonstrated that Elmo Greer intentionally buried the tires unearthed from the Goffs' land and that such behavior warranted a $1 million punitive damage award. In support of this conclusion, the trial court noted that the burying of tires was against the State's policy "to avoid pollution and the creation of unpermitted landfills," that the "State of Tennessee has a strong and legitimate interest in preventing construction companies . . . from dumping or polluting property located within the state," and that "[b]urying solid waste tires is a violation of [the] Tennessee Solid Waste Disposal Act." The Court of Appeals determined that because the jury found that Elmo Greer had not committed an environmental tort, the trial court should not have relied on the State's environmental statutes and policies in affirming the award of punitive damages. Based on this finding, the Court of Appeals reversed the award of punitive damages and remanded the case to the trial court to reconsider the award based on the nuisance theory alone.

The Goffs assert that the trial court correctly considered the State's pollution statutes in affirming the punitive award because these laws and the

policies they reflect are relevant in determining the reprehensibility of Elmo Greer's actions. The Goffs further assert that the trial court did not consider the environmental tort claim itself in reviewing the punitive award, but the facts supporting the nuisance claim. Elmo Greer responds that the trial court improperly based the punitive award upon an environmental tort theory that the jury rejected. Accordingly, Elmo Greer argues that the Court of Appeals properly corrected the trial court's error by remanding the case for reconsideration of the punitive award without regard to the State's environmental laws. We are persuaded that the Goffs have the better argument.

The evidence supporting the nuisance claim was the proof regarding buried whole waste tires. In order to determine the reprehensibility of burying whole waste tires, the trial court considered the State's policy regarding such action. To this end, the trial court correctly noted that the State has enacted legislation against burying whole waste tires, recited the public policy behind that legislation, acknowledged that Elmo Greer was aware of the State's policy against burying waste tires, and observed that high civil penalties are permissible for burying waste tires. In our view, the fact that the legislature has determined it necessary to prevent the improper burial of tires "to protect the public health, safety and welfare" is important in the discussion of the reprehensibility of Elmo Greer's actions. *See* Tenn. Code Ann. § 68-211-102(a). Accordingly, we do not find

that these assertions by the trial court implied that the jury found Elmo Greer liable for violating any of the state's Hazardous Waste Disposal Acts or that the trial court relied upon the environmental tort cause of action itself in reviewing the punitive award. Instead, we find that the trial court referenced the State's solid waste disposal laws to explain why the creation of a nuisance by burying whole waste tires was egregious enough to warrant punitive damages. Moreover, as noted above, the same facts supporting a violation of the Solid Waste Disposal Act can constitute a nuisance, as found by the jury in this case. *See Wayne County,* 756 S.W.2d at 283. We thus conclude that the trial court's consideration of statutes and policies against pollution and unauthorized landfills was legally permissible and factually appropriate.

C. Excessiveness of the Award/Due Process

Having determined that the record contains evidence sufficient to award punitive damages and that the trial court did not err in referencing the State's environmental laws in reviewing the punitive award, we now must decide whether the size of the award violates Elmo Greer's due process rights under the Fourteenth Amendment to the United States Constitution. *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 412 (2003); *Gore,* 517 U.S. at 562-63; *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 7-8 (1991). When deciding whether a punitive damages award is excessive to the point that it

transgresses constitutional due process standards, our review is de novo to ensure that the award is based on an application of the law rather than the jury's caprice. *Campbell,* 538 U.S. at 418.

The United States Supreme Court squarely addressed for the first time whether a punitive damages award offended the Fourteenth Amendment in *Haslip,* 499 U.S. at 18. In *Haslip,* the jury found the defendant liable for fraud and awarded compensatory damages in the amount of $200,000 together with punitive damages in the amount of $840,000. The Court began its analysis by reviewing the long-standing history of punitive awards, noting first that "'[p]unitive damages have long been a part of traditional state tort law,'" *id.* at 15 (quoting *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 255 (1984)), and concluding that it "cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional," *id.* at 17. The Court also acknowledged, however, that "[o]ne must concede that unlimited jury discretion – or unlimited judicial discretion for that matter – in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Id.* at 18. Recognizing the difficulty in attempting to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable," the Court in *Haslip* emphasized that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into

the constitutional calculus." *Id.* The Court then upheld the punitive award before it, holding as follows:

> We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip, and, of course, is much in excess of the fine that could be imposed for insurance fraud under [Alabama law]. Imprisonment, however, could also be required of an individual in the criminal context. While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.

Id. at 23-24 (citations omitted).

Several years later, again considering a due process challenge to punitive damages, the Court made clear that "notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore,* 517 U.S. at 574. And, although the Court has emphasized that punitive damages are "aimed at deterrence and retribution," *Campbell,* 538 U.S. at 416, and that a jury's "imposition of punitive damages is an expression of its moral condemnation," *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424,

432 (2001), it has also warned that "[t]o the extent an award [of punitive damages] is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Campbell*, 538 U.S. at 417. To assist courts in determining whether a punitive award is grossly excessive and violates due process, the Court has identified three guideposts: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. at 574-75. We will consider the application of each of these guideposts to the punitive damages awarded in this case.

(1) Reprehensibility of the Conduct

The first of the three guideposts is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575. Citing factors similar to those set forth in *Hodges*, the Supreme Court has explained that "some wrongs are more blameworthy than others," *id.*, including "trickery and deceit," *id.* at 576 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993)). And while the Court has indicated that purely economic harm may be less reprehensible than harm involving health and safety, it has also indicated that "infliction of economic injury, especially when done intentionally through affirmative acts of

misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." *Id.* at 576 (citation omitted). The Supreme Court has also observed that, when addressing the reprehensible nature of a defendant's conduct, courts should consider whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419.

Applying these factors to the instant case, we find Elmo Greer's actions objectionable in several significant ways. First, Elmo Greer intentionally buried tires on the Goffs' property. Elmo Greer engaged in this deliberate conduct despite its repeated assurances to Mr. Goff "not to worry about it" and "we'll clean it up," and despite Mr. Goff's specific request that the tires not be buried. Second, this intentional conduct included an effort by Elmo Greer to hide its deliberate misdeeds because Elmo Greer buried the tires under large, heavy limestone rocks – some as large as a pick-up truck – eight or nine feet underground. The Goffs were helpless to discover the tires without hiring excavation experts at their own expense. Third, because Mr. Anderson testified that

there is a cost associated with properly disposing of tires, it appears that Elmo Greer buried them to avoid having to pay these expenses.[12] Fourth, Elmo Greer knew that its conduct was not only in violation of its contract with the Goffs, but was illegal as well, for Mr. Anderson admitted to being aware of State law regarding the disposal of tires. He also knew that Elmo Greer would have faced heavy penalties had the company been caught burying tires. Fifth, Elmo Greer's conduct violated clearly expressed public policies regarding pollution and unauthorized landfills. The legislature has clearly set forth the public policy behind the State's solid waste disposal laws:

> In order to protect the public health, safety and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, enhance the beauty and quality of our environment and provide a coordinated statewide solid waste disposal program, it is declared to be the public policy of the state of Tennessee to regulate solid waste disposal to:
>
> (1) Provide for safe and sanitary processing and disposal of solid wastes;

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[12] The trial court observed that Elmo Greer "knew how large tires were required to be cut up and shredded and then disposed of in an approved site. It is difficult to determine the defendant's motivation. Was it convenience? Was it laziness? Was it 'we won't get caught'? Was it to save money and increase profit? Whatever the motivation, it was not admirable."

> (2) Develop long-range plans for adequate solid waste disposal systems to meet future demands; [and]
>
> (3) Provide a coordinated statewide program of control of solid waste processing and disposal in cooperation with federal, state, and local agencies responsible for the prevention, control, or abatement of air, water, and land pollution.

Tenn. Code Ann. § 68-211-102(a).[13] The legislature has also noted the important state interest of "educat[ing] and encourag[ing] generators and handlers of solid waste to reduce and minimize to the greatest extent possible the amount of solid waste which requires collection, treatment, incineration or disposal through source reduction, reuse, composting, recycling and other methods." *Id.* § 68-211-803(b). Despite being aware of these policies, Elmo Greer elected to ignore them.

Elmo Greer's conduct was exacerbated by its refusal to accept responsibility for its actions. Mr. Anderson conditioned the company's apology by stating that "*[i]f* Elmo Greer had something to do with [the tires], [it was] sorry." (Emphasis added). Elmo Greer's witnesses downplayed the significance

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[13] Like the trial court, we reference relevant portions of the Solid Waste Disposal Act to explain why burying tires constitutes reprehensible conduct, though we realize that the jury did not find Elmo Greer liable for creating an "environmental hazard."

of the concealed tires. This testimony, in our opinion, does not demonstrate much accountability or remorse – important factors in evaluating the likelihood that a tortfeasor will repeat its tortious conduct. Instead, it suggests that Elmo Greer operates with the mind-set that burying tires in violation of the law and in breach of contractual obligations is simply "no big deal."

These multiple aspects of Elmo Greer's conduct are indicative of bad faith. *See Gore,* 517 U.S. at 579 (invalidating a punitive damage award in part because the record disclosed "no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive"). Moreover, they indicate that Elmo Greer was willing to deliberately harm not only the Goffs, but willing to place others potentially at risk by essentially creating an unauthorized landfill. Elmo Greer's disregard for the public interest is all the more troubling in light of the fact that it was acting as a contractor for the State of Tennessee. Elmo Greer did nothing to alleviate the situation its indifference had created, but rather chose to hide and trivialize it.

At the same time, consistent with the testimony presented, the jury found that Elmo Greer did not create an environmental hazard to the Goff property. The expert testimony was clear that there is little likelihood that environmentally dangerous or other hazardous chemicals have been spilled onto the land or into the water supply. The Tennessee Department of Environment and Conservation was made aware of

the situation but declined to assess any penalties because it did not find any long term health or safety risks to exist on this property.

Thus, although Elmo Greer's conduct was sufficiently reprehensible for this guidepost to point toward a substantial punitive damages award, it did not rise to the highest level of reprehensibility.

(2) Disparity Between the Harm and the Award

The second guidepost is the "disparity between the harm or potential harm suffered" and the punitive damages awarded. *Gore,* 517 U.S. at 575. This guidepost reflects the general concern that punitive damages bear a "reasonable relationship" to compensatory damages. *Id.* at 580. According to the Supreme Court, "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred." *Id.* at 581 (internal quotation marks and citation omitted). Although the Court has repeatedly refused to "impose a bright-line ratio which a punitive damages award cannot exceed," the Court has also stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *Campbell,* 538 U.S. at 42. *See also Gore,* 517 U.S. at 582-83 ("Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical

formula. . . ."). Moreover, the Supreme Court has made clear that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff," and that "there are no rigid benchmarks that a punitive damages award may not surpass." *Campbell,* 538 U.S. at 425.[14] We agree.

The Supreme Court has acknowledged that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *Gore,* 517 U.S. at 5829. "A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.*[15]

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[14] Although the Supreme Court has not adopted a bright-line rule to be applied, it did impose a specific 1-to-1 ratio of punitive damages to compensatory damages in *Exxon Shipping Co. v. Baker,* 128 S. Ct. 2605 (2008). In that case, following the wreck of the *Exxon Valdez* and the resulting oil spill in Alaska, compensatory damages were assessed against Exxon in the amount of $507.5 million, plus punitive damages of $5 billion. After noting that the case "differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process," the Court determined that a 1-to-1 ratio of punitive damages to compensatory damages "is a fair upper limit in such maritime cases." *Id.* at 2626, 2633. The Court therefore remitted the punitive damages award to $507.5 million.

[15] We note that some federal courts have suggested that in cases where nominal damages are awarded, the ratio inquiry

(Continued on following page)

However, the Court has described as "breathtaking" a 500-to-1 ratio between punitive and compensatory awards. *Id.* at 583.

In this case, Elmo Greer asserts that a $1 million punitive damage award is excessive because it exceeds the compensatory award by a ratio of 302 to 1. Thus we must analyze the Supreme Court's cases dealing with punitive damages in greater detail to determine whether focusing only on the ratio, and insisting that only single-digit ratios are constitutional, reflects an overly restrictive view that does not comport with the Supreme Court's jurisprudence on the subject.

In *TXO Production Corp.*, 509 U.S. at 453 the Supreme Court affirmed a punitive damage award that was 526 times as great as the compensatory damages. In that case, TXO contracted to purchase the oil and gas rights on a tract of land owned by Alliance. TXO subsequently manufactured a claim that title to the property was defective and attempted to renegotiate its deal with Alliance. When the negotiations were unsuccessful, TXO sought a declaratory judgment to remove the purported defect. Alliance counterclaimed for slander of title and was awarded

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can be largely disregarded. *See, e.g., Abner v. Kansas City S. R.R.*, 513 F.3d 154, 165 (5th Cir. 2008); *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 154-55 (4th Cir. 2008). Although the compensatory award of $3,305 in this case is not nominal, it is low enough that we consider the ratio guidepost with caution.

$19,000 in actual damages and $10 million in punitive damages. In affirming the award, the Supreme Court observed that it "is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 4601. The Court then held that it did

> not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

Id. at 462 (footnote omitted).

Other courts have been willing to affirm ratios exceeding single digits when the compensatory damages were relatively low but the actions of the

wrongdoer were egregious. For example, in *Saunders v. Branch Banking & Trust Co. of Virginia,* 526 F.3d 142, 154-55 (4th Cir. 2008), the Fourth Circuit affirmed an 80-to-1 ratio in a case involving violations of the Fair Credit Reporting Act. In *Abner v. Kansas City Southern Railroad,* 513 F.3d 154, 165 (5th Cir. 2008), the Fifth Circuit affirmed a 125,000-to-1 ratio in a case involving a race-based hostile work environment. In *Kemp v. American Telephone & Telegraph Co.,* 393 F.3d 1354, 1365 (11th Cir. 2004), the Eleventh Circuit imposed a punitive award of $250,000 accompanying compensatory damages of only $115.05, a ratio of 2,173 to 1. In *Mathias v. Accor Economy Lodging, Inc.,* 347 F.3d 672, 678 (7th Cir. 2003), the Seventh Circuit upheld a 37.2-to-1 ratio in a case involving bedbugs at a motel. In *Lynn v. TNT Logistics North America Inc.,* 275 S.W.3d 304, 312 (Mo. Ct. App. 2008), the court imposed in a sexual harassment case a punitive award equivalent to a 75-to-1 ratio. In *Jones v. Rent-A-Center, Inc.,* 281 F. Supp. 2d 1277, 1290 (D. Kan. 2003), the court upheld a 29-to-1 ratio in a sexual harassment case. These cases reflect the principle that "there are no rigid benchmarks that a punitive damages award may not surpass," but instead "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Campbell,* 538 U.S. at 425.

In this case, the ratio of $1 million punitive damages to compensatory damages as approved by the trial judge is over 302 to 1. This ratio is excessive

in light of the circumstances presented. As set forth above, Elmo Greer buried tires which, while constituting a nuisance, do not constitute an environmental hazard or threaten the health or safety of any individual.

Before leaving this point, however, we note that the jury heard proof that the cost to plaintiffs to clean up the entire property, to ensure that no other impermissible waste materials are buried on their property, would be $318,000. Although the jury rejected the notion that this amount was the required measure of damages, it highlights the problem that the monetary value of noneconomic harm is sometimes difficult to determine, thus justifying a higher ratio. *Gore,* 517 U.S. at 583.

(3) Difference between Punitive Damages and Other Penalties

The third and final guidepost requires courts to compare the punitive damage award to civil or criminal penalties authorized or imposed in comparable cases. *Gore,* 517 U.S. at 583. The Supreme Court has instructed that in determining whether the award is excessive, courts should give "'"substantial deference" 'to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *Id.* at 583 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). Penalties that could be imposed for similar conduct "are

relevant because they provide defendants with notice of the severity of the penalty that may be imposed upon them." *Flax,* 272 S.W.3d at 537. We also note that at least one court has observed that "when the punitive damages are compared to the civil or criminal penalties that could be imposed for comparable conduct, the ratio of punitive damages to compensatory damages becomes less significant." *Bronakowski v. Lindhurst,* ___ S.W.3d ___, 2009 WL 1816165, at *___ (Ark. Ct. App. June 24, 2009).

In this case, we are readily able to determine the amount of civil penalties that may be assessed for the improper disposal of waste tires. Tennessee Code Annotated section 68-211-117(a)(1) provides for "a civil penalty of not less than one hundred dollars ($100) nor more than five thousand dollars ($5,000) per day for each day of violation [of the Solid Waste Disposal Act]." The tires Elmo Greer buried on the Goffs' property remained there for approximately seven years, or roughly 2,500 days. Accordingly, Elmo Greer could have faced civil penalties ranging from $250,000 to $12.5 million.[16] Thus, the $1 million punitive award imposed upon Elmo Greer is within the civil fine range authorized by the legislature.[17]

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[16] Persons violating the Solid Waste Disposal Act may also be found guilty of a Class B misdemeanor for each day of violation. *See* Tenn. Code Ann. § 68-211-114.

[17] The Goffs point out that the award is also less than 2% of Elmo Greer's net worth for 2003, though they recognize that a defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." *Campbell,* 538 U.S. at 427.

However, Johnny Michael Apple, Director of Solid Waste Management for the Tennessee Department of Environment and Conservation, testified that no fines had been or would be imposed on Elmo Greer for this violation and that no further investigation of this property was needed. Given the apparent disparity between the sanctions authorized by the legislature and the sanctions that would, in practice, be imposed, we cannot conclude that this guidepost either supports or undermines the punitive damages awarded.

In short, we have carefully considered the application of the three guideposts to the punitive damages awarded in this case. After doing so we are constrained to acknowledge that the punitive award approved by the trial court is too large given the circumstances and does violate Elmo Greer's due process rights. We conclude that the award must be modified to $500,000. This award sends a strong message about the serious nature of Elmo Greer's misconduct. At the same time, however, it is more rationally related to the non-physical harm suffered in this case.

D. Punitive Damages Jury Instructions

Elmo Greer asserts that the trial court erred by instructing the jury that intentional or reckless conduct can form the basis for punitive damages because the Goffs pled only intentional and fraudulent misconduct. Elmo Greer further claims that the trial court erred in failing to instruct the jury that punitive

damages are proper only in egregious circumstances. *See Hodges,* 833 S.W.2d at 901 ("We agree with those States that have refined their laws to restrict the awarding of punitive damages to cases involving only the most egregious of wrongs."). In considering this issue, we note that Tennessee law is clear that a jury charge should be reviewed in its entirety and considered as a whole when determining whether the trial court committed prejudicial error. *Otis v. Cambridge Mut. Fire Ins. Co.,* 850 S.W.2d 439, 446 (Tenn. 1992). "The charge will not be invalidated as long as it fairly defines the legal issues involved in the case and does not mislead the jury." *Id.*

Regarding the trial court's failure to include the word "egregious" in the charge, we find no error. While it is true that this precise word was not included in the charge, it is also true that Tennessee Pattern Instruction – Civil 14.55, which covers the subject of punitive damages, was incorporated in its entirety into the charge. In our view, the charge as given complied with the essentials of *Hodges.* Although juries must be made aware that punitive damages are reserved for cases involving more than mere negligence, specifically those cases involving intentional, fraudulent, reckless, or malicious conduct, *Hodges,* 833 S.W.2d at 901, we find that the trial court fairly defined the legal principles of punitive damages and in no way misled the jury. Further, as requested by Elmo Greer, the question

posed on the verdict form did contain the word "egregious."[18] We hasten to add, however, that in the interest of clarity trial courts would do well to explicitly charge that punitive damages are reserved for egregious conduct as a way of crystalizing the point that punitive damages do indeed represent "strong medicine." *Gore,* 517 U.S. at 577. We do not believe, however, that the lack of such specificity in this particular case amounts to reversible error.

Regarding the trial court's inclusion of the word "reckless" in the charge, we also find no error. Placing substance over form, Tennessee law recognizes that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Tenn. R. Civ. P. 15.02. Determining whether an issue was tried by implied consent rests with the discretion of the trial judge whose determination will be reversed only upon a finding of abuse. *Zack Cheek Builders, Inc. v. McLeod,* 597 S.W.2d 888, 891 (Tenn. 1980).

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[18] The question submitted by Elmo Greer in its proposed special verdict form was, "Have the plaintiffs proved by clear and convincing evidence that Greer and Sons Construction Company is guilty of such egregious and intentional, and/or fraudulent acts that an award of punitive damages should be assessed against the defendant as punishment for these actions?" The question as posed by the trial court was identical, except that "or reckless" was substituted for "and/or fraudulent." *See* footnote 11, *supra.*

Here, the trial court instructed that punitive damages "may be considered if, and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted either intentionally or recklessly." Elmo Greer asserts that because the Goffs did not plead "reckless," it should not have been included in the instruction. We disagree. At trial, Elmo Greer's attorney stated to the jury that "Elmo Greer is being sued for lots of money to punish us for punitive damages because the Goff's [sic] claim that we intentionally or deliberately or *recklessly* caused contamination on their property." (Emphasis added). Further, at the conclusion of the Goffs' proof, Elmo Greer moved to dismiss, stating that the evidence "just doesn't show the kind of malicious, *reckless* kind of conduct that *Hodges* requires." (Emphasis added). During closing arguments, Elmo Greer's attorney stated that (1) "[i]t is not a charge to be taken lightly because they are saying we purposefully or *recklessly* put items into the fill [area]," (2) "[y]ou can't stay in business if you are in the business of going out and doing intentional or *reckless* acts," and (3) Elmo Greer "didn't act *recklessly*." (Emphasis added). In light of these circumstances, we conclude that the trial court was within its discretion to determine that the parties impliedly consented to try assertions that Elmo Greer's reckless actions warranted punitive damages and, further, that the evidence supported the inclusion of instructions to the jury on reckless behavior.

III. Motion for Mistrial

During his testimony, Mr. Goff began to speak about his preparation for Elmo Greer of an estimate of the damages he had sustained. His attorney handed to him a document, which was a letter he sent to Elmo Greer's insurance adjusting company detailing the damage to his house and vehicles caused by Elmo Greer's blasting activities. Prior to Mr. Goff identifying or reading the letter, Elmo Greer's counsel said to the court, "We need to have a discussion about that." Counsel then approached the bench and, outside the hearing of the jury and not contained in the record, had a conversation about the letter. At the conclusion of the conference, Mr. Goff's counsel resumed questioning his client with the instruction not to identify the recipient of the letter. After a few more questions, counsel for Elmo Greer again asked for a bench conference, the contents of which are not in the record. Thereafter, the trial judge and counsel continued their conversation in the jury's presence, discussing the need for additional redactions before the document could be admitted as an exhibit. No party, witness, or attorney ever mentioned "insurance." Suddenly, and sua sponte, the trial judge said to the jury:

> Well, you jurors are . . . wondering what in the world is this judge trying to keep from us. Well, I might as well just tell you. It's improper and inappropriate for a jury to even consider or discuss or even think about the fact that somebody might have

> insurance. So, it would be improper for you, at any time during this trial or during your deliberations, to discuss or consider or think about or anything else with regard to whether somebody did have or didn't have insurance. So, don't you worry about that and it would be a violation of your oath as a juror to discuss that or let that influence you in any way, one way or the other. The damages are what the damages are. If there's liability, there's liability. If there's not, then insurance hasn't got a thing in the world to do with it, okay? You follow that instruction.

Mr. Goff then read the approved portions of the letter to the jury. Elmo Greer later moved for a mistrial, asserting that the trial court's instruction to the jury not to consider insurance was the equivalent of instructing the jury that insurance was involved and that the parties had tried to settle the case. The trial court denied the motion. Elmo Greer asserts that the trial court's mention of insurance during the trial prejudiced the company as evidenced by the jury awarding minimal compensatory damages but substantial punitive damages.

Evidence concerning the existence of insurance is generally inadmissible at trial. Tenn. R. Evid. 411 ("Evidence that a person was or was not insured against liability is not admissible upon issues of negligence or other wrongful conduct."). The injection of insurance during trial, however, does not necessarily warrant a mistrial, *Seals v. Sharp,* 212 S.W.2d

620, 623 (Tenn. Ct. App. 1948), but may when the reference to insurance was made willfully for the purpose of influencing the jury, *see Terry v. Plateau Elec. Co-op.*, 825 S.W.2d 418, 422-23 (Tenn. Ct. App. 1991). In the absence of such willful injection, a curative instruction to the jury not to consider insurance will suffice because juries are presumed to follow the court's instructions. *See CSX Transp., Inc. v. Hensley,* 129 S.Ct. 2139, 2141 (2009) ("as in all cases, juries are presumed to follow the court's instructions").

In this case, there is nothing in the record to suggest that any of the participants in the trial willfully (or at all) referred to insurance in an attempt to influence the jury. *See McClard v. Reid*, 229 S.W.2d 505, 506 (Tenn. 1950) ("[I]t is more or less a question for the trial court, to exercise his discretion on, as to whether or not the plaintiff has deliberately injected the insurance question to the prejudice of the defendant."). It was the trial judge himself who sua sponte mentioned insurance. Moreover, the trial court then specifically informed the jury that insurance was not to be considered at any point during the trial or deliberations. Accordingly, while we caution trial judges against raising matters that cannot be introduced by the parties, we do not find that the trial court abused its discretion in denying Elmo Greer's motion for a mistrial. *See Hunter v. Ura,* 163 S.W.3d 686, 699 (Tenn. 2005) ("Whether to grant a mistrial is a decision left to the discretion of the trial court.").

Conclusion

For the foregoing reasons, we conclude that the evidence supports the award of punitive damages and that the trial court did not err in considering the State's environmental laws in approving the punitive award. We further conclude that the amount of the punitive damages award is excessive and does violate Elmo Greer's due process rights. We therefore modify the amount of punitive damages awarded to the Goffs to $500,000. We also find no error in the trial court's instructions to the jury regarding punitive damages. Finally, we hold that the trial court did not abuse its discretion in denying Elmo Greer's motion for a mistrial based on the mention of insurance at trial. Accordingly, the decision of the Court of Appeals is reversed and the judgment of the trial court is reinstated as modified. The costs of this appeal are taxed to Elmo Greer & Sons Construction Company and its surety, for which execution may issue if necessary.

CORNELIA A. CLARK, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

June 2, 2009 Session

DAVID GOFF ET AL. v. ELMO GREER & SONS CONSTRUCTION CO., INC.

Circuit Court for White County
No. CC-320

No. M2006-02660-SC-R11-CV

JUDGMENT

(Filed Nov. 3, 2009)

This case was heard upon the record on appeal from the Court of Appeals, application for permission to appeal having heretofore been granted, briefs and argument of counsel; and upon consideration thereof, this Court is of the opinion that the Court of Appeals erred when it reversed the $1 million award of punitive damages. The evidence supports the award of punitive damages. However, the $1 million punitive award violates the defendant's due process rights and must therefore be modified to $500,000.

In accordance with the opinion filed herein, it is, therefore, ordered and adjudged that the $1 million punitive damages award is modified to $500,000 and the trial court's judgment is reinstated as modified.

The costs of this cause are taxed to defendant Elmo Greer & Sons Construction Company, Inc., and its surety, for which execution may issue if necessary.

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

NOVEMBER 27, 2007 Session

DAVID GOFF ET UX, ET AL. v. ELMO GREER & SONS CONSTRUCTION CO., INC.

Direct Appeal from the Circuit Court for White County
No. CC-320 John A. Turnbull, Judge

No. M2006-02660-COA-R3-CV – Filed May 16, 2008

This appeal involves a jury's award of punitive damages. The construction company entered into a contract with the State of Tennessee to widen a portion of a highway. The homeowners entered into a contract with the construction company allowing the construction company to place excess materials generated from the highway project on the homeowners' property. In exchange, the homeowners would receive compensation based on the cubic fill area, and the company would fill and grade that portion of the homeowners' property. The project required that the construction company conduct extensive blasting near the homeowners' house and vehicles. One of the homeowners became concerned when he witnessed the construction company placing various garbage items and tires on his property near the fill area. After three years, the construction company finished the project. The homeowners brought suit, alleging that the company failed to pay the amount due under

the contract and caused damage to their house due to the blasting. The complaint also alleged that the company buried certain items, including tires, on the property which constituted an environmental tort. The homeowners' amended complaint stated a cause of action in nuisance and also sought an award of punitive damages in the amount of $1 million dollars. The jury returned a verdict in favor of the homeowners for the nuisance claim in the amount of $3,305.00 and found that punitive damages should be imposed on the construction company. The jury found in favor of the construction company for the environmental tort claim. After the second phase of the trial, the jury returned an award of $2 million in punitive damages. The trial court remitted the award to $1 million, the amount of the homeowners' *ad damnum*. The construction company appeals, and we reverse and remand in part and affirm in part.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded in Part and Affirmed in Part

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Linda J. Hamilton Mowles, Knoxville, TN, for appellant

John C. Knowles, Sparta, TN; John P. Pryor, Smithville, TN; Jon E. Jones, Cookeville, TN, for Appellees

OPINION

I. Facts & Procedural History

David Goff and his wife, Joyce Goff, along with David's mother, Agnes Goff (collectively the "Goffs" or "Appellees") own approximately 400 acres on both the east and west sides of Highway 111 in Sparta, Tennessee. The highway runs directly in front and directly behind David and Joyce Goff's house located on a portion of this 400 acre tract. The State of Tennessee planned to widen Highway 111, and Elmo Greer & Sons Construction Company, Inc. ("Construction Company" or "Appellant") received the contract with the State to build six miles of the Highway 111 four-lane road.[1] The State's plan required that Construction Company widen the "cut" directly in front of the Goffs' home, which required extensive blasting. Construction Company sought to place the excess material that this process would generate on the Goffs' property. Construction Company and the Goffs entered into a contract whereby Construction Company could temporarily place the excess rock and dirt on the east side of the Goffs' property. The Goffs were to receive ten cents per cubic yard in exchange for Construction Company receiving the right to place "dirt, rock, and other excess material from the jobsite" on the Goffs' property. The agreement also

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[1] More specifically, Construction Company was the general contractor and subcontracted out the bridge work and paving. It performed the grading work.

provided that "the area[2] in which said material is to be deposited will be left in a neat and graded condition." Construction Company drafted the aforementioned contract.

Construction Company began the project in March of 1994, and finished in 1997. The Goffs brought suit on June 30, 1998, alleging breach of contract due to Construction Company's failure to pay the ten cents per cubic yard for the use of the property. The Goffs also sought damages caused by Construction Company's blasting, claiming that rocks and debris flew onto their property, damaging their vehicles and house. The Goffs also alleged damages caused by Construction Company's burying of waste on the property:

> The defendants . . . have unlawfully and in violation of environmental laws buried refuse and other objects such as automotive parts, large earth moving rubber tires and other impermissible materials on the property of the plaintiffs[ ] . . . when disposition of such objects should have been made in compliance of environmental standards and which will likely result in damages to the real estate of these plaintiffs. . . .

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[2] The contract describes the area as follows: "Right of +/- Station 375.00 S.R. 111." The Goffs contended at trial that the area was around five to seven acres. Construction Company contended at trial the area was around three to five acres. In any event, the exact size of the fill area is not determinative of the issues on appeal.

Thereafter, the Goffs moved to amend their complaint, and the trial court granted leave to amend. The Goffs' amended complaint added the following claim of nuisance:

> [T]he defendant, its servants, agents and employees did commit acts of nuisance upon the land of the plaintiffs by spilling upon the property oil and petroleum products and by burying and concealing trash, garbage, waste products, rubber tires, oil filters, used and discarded machinery parts, all without the permission or authorization of the plaintiffs and did thereby create an unauthorized, unlicensed and prohibited landfill. . . . As a result of the actions on the part of the defendant in creating and inflicting injury upon the plaintiffs, the defendant is liable to the plaintiffs for the costs and expenses of excavating, removing, and disposal of the waste materials buried upon the property of the plaintiffs in order to remediate and reclaim the real estate to the condition that the property was in prior to the commission of the acts of nuisance. The defendant shall also be liable to the plaintiffs for a fair rental value during the time that the defendant has used the property for the unauthorized landfill until the defendant has paid the cost of reclamation in order to restore the plaintiffs' property to its undamaged condition.

The Goffs' amended complaint also sought an award of $1 million in punitive damages: "Plaintiffs do further amend their complaint to demand compensatory

damages of the defendant in the amount of Five Hundred Thousand ($500,000.00) Dollars, and an additional sum of One Million ($1,000,000.00) Dollars in punitive damages."

Trial commenced on June 28 and concluded on June 30, 2006. The parties stipulated that Construction Company was liable for breach of contract in the amount of $5,355.50, which represented 53,555 cubic yards of fill material that went onto the Goffs' property during construction, at 10 cents a cubic yard. Both Mr. and Mrs. Goff testified as to the damage to their home and vehicles caused by Construction Company's blasting. Mr. Goff testified that Construction Company conducted blasting as close as 100 feet from their home, and oftentimes did not warn the Goffs prior to commencing blasting.[3]

As to the claim that Construction Company buried certain items on the Goffs' property, Mr. Goff testified as follows:

> [T]hey were staging equipment there [near the fill area] and doing oil changes and, you know, the ground is black. . . . They also repaired their equipment there, so when they took the thing apart, lots of oil and grease got on the ground.

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[3] We need not get into great detail of the testimony concerning the property damage caused by blasting, as neither party appeals that issue. Nor is the strict liability claim relevant to the issue of punitive damages.

> . . .
>
> I – I became concerned. Well, they were spilling a lot of stuff there.
>
> . . .
>
> [A]s they were filling [ ] they were just putting anything out there in the fill and when I would approach them, [they said that] we'll take care of that. We'll take care of that.

More specifically, Mr. Goff testified that he saw the following items in the fill area: "hydraulic lines, parts that say CAT on them, boxes that say CAT, Rotella containers. . . . That's a motor oil, I think. . . . Plastic, gallon, sort of like antifreeze comes in. . . . [R]ods and all, you know, just things that would come off big equipment." Mr. Goff also testified that he saw 55-gallon barrels and tires stacked in the area. This concerned him, so he asked the workers "'Guys, you're not going to bury anything on me except rock and dirt, right? That's our agreement[,]' to which the workers responded, 'Don't worry about it. We will clean it up. We're going to slope [the fill area] down to the road, and you're going to be real pleased with what we do.'"

Mr. Goff testified that he was especially concerned that Construction Company was burying tires on his property: "There was four or five tires . . . and it had big rocks on it. . . . Well, in seeing that, you know, you wouldn't think they'd dump them on there and then take them off and haul the tires off. So, I – I got my

camera and I made pictures. I also . . . went and told them, I said, it looks like you're fixing to bury some tires. Don't do that." None of the Goffs actually witnessed any of Construction Company's employees burying tires or any other improper materials.

The deposition of Construction Company's chief engineer, Lee Anderson, was read to the jury, and Mr. Anderson also testified at trial. Mr. Anderson supervised the Highway 111 project. As to the company policy concerning tires, he testified that "we use a lot of tires. Limestone rock punches holes in them and wears them out. As they become flat or unusable, we stack them up and then we haul them back [to Construction Company's home office] and we turn them back in. They have some value to them." Mr. Anderson testified that the tires are stacked, "then once we get them – get a full load, we send a truck to pick them up. . . . We inventory them and then they dispose of them. They are recapped. We reuse them on other equipment." Mr. Anderson testified that some tires are unsuitable for reuse, however, and that there is a financial cost associated with disposing of these tires.

Mr. Anderson conducted the final inspection of the fill site upon completion of the project: "I reviewed the project to see how much equipment, how much materials were left and . . . what kind of trucks the shop should send to pick up what we had left over." Mr. Anderson observed tires lying on the completed fill area, so he "called the shop and told them to come

pick up the equipment, and the tires, and any other surplus equipment. . . . "

As to the policy concerning oil disposal, Mr. Anderson testified as follows: "We change the oil every so many hours depending on the size of the machine. And we take the used oil, put it into drums, send it back to [the home office]. And [ ] we use it to heat our shop, we recycle the oil."

Mr. Goff did admit that after completion of the fill work, he saw one of Construction Company's trucks hauling off tires. Convinced that Construction Company nevertheless buried tires and other items under the fill material, Mr. Goff testified that he hired Lloyd Shores Trucking and Excavation and asked them to dig in that area of the property. This first dig produced one "big" tire, which Mr. Goff described as being 8 feet tall by 24 inches wide. The excavation company dug a total of five holes that day and found another smaller, truck tire. The second dig occurred on June 17, 2006, and uncovered four additional truck tires of various sizes. Mr. Goff testified that the second dig focused on an area of about a half acre of the fill area. They also uncovered two steel pipes.

When asked why six tires were found on the Goffs' property, Mr. Anderson testified that "I have no idea," nor could he say for sure where the tires came from: "it makes sense that they were ours but I don't know that. They could be [Mr. Goff's tires]." He did admit that Construction Company used tires like the

ones buried on the property, but that he did not personally observe any of Construction Company's employees burying anything other than fill material. He admitted on cross examination that he was not on the site for the entire project, as he supervised various other projects during that time.

This discovery of tires prompted Construction Company to perform its own investigation. Michael Corn, an engineer with AquAeTer, Inc., conducted core sampling of the fill area. He testified as to the process of "boring," which he described as "pushing a probe down in the soil and taking soil samples." From these samples, he concluded that there were no hazardous materials or hazardous waste at the site. Mr. Corn testified that tires were not considered hazardous material. He testified that to his knowledge, a few tires and pipes buried on private property would not create a "problem with the Solid Waste Disposal Act."

Ken Johnson, a geologist employed by First Response, Incorporated, testified that upon the Goffs' request, he performed an initial evaluation of the property in the fall of 2003. Mr. Johnson testified that he saw on top of the ground a large oil filter from some type of large earth-moving equipment on the property, along with two tires. As to the core sampling, he testified that it is a "very limited scope of exploration," and that the only way buried tires would be discovered using this method would be if the core barrel or the drill made contact with the buried tires. Mr. Johnson testified that the only way he

would certify that there was not any solid waste left on the Goffs' property would be to excavate the entire fill area.[4] He estimated that this would cost six dollars a cubic yard, or $318,000. This estimated cost, however, depended on what, if any, types of materials would be uncovered.

On cross examination, Mr. Johnson testified that he did not observe any oil sheens on the property, nor did he have pictures of the oil filter or the tires that he observed on the property. He also testified that he did not make a recommendation that the Goffs dig up the entire fill area, but rather gave an estimate of what that procedure would cost. He admitted that tires are considered a nonhazardous waste.

William Parrish, a real estate appraiser, valued the fill area property at $50,000 upon the Goffs' request, assuming the property was free from any buried solid waste. Based on Mr. Johnson's aforementioned estimate, Mr. Parrish estimated the cost to cure the property at $375,000. Mr. Parrish testified that if the property has solid waste buried on it, then the value of the property would be zero, "[b]ecause under Tennessee law you have to disclose any latent defects of the property. . . . And as I see now, it isn't a really good fill for construction, large items in it,

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[4] When asked about this, Mr. Corn testified that he believed it was unnecessary "to dig up all this fill material that had been placed there[,] . . . [because] we haven't found anything that would require that level of effort to dig up a site."

including large boulders as well as tires. It doesn't seem to be very stable as far as a building site."

Construction Company called Johnny Apple, the director of the division of solid waste management for the Tennessee Department of Environment and Conservation, as a witness. Mr. Apple testified that his department "didn't see anything unusual that would indicate [the need for] further investigation."

The jury returned a special verdict in favor of the Goffs as follows:

> 1. For breach of contract, the defendant, . . . shall pay unto the plaintiffs [ ]the sum of $5,355.50, as agreed by the parties. (The Court does reserve the calculation of pre-judgment interest).
>
> . . .
>
> 3. The jury did find that the damages suffered by the plaintiffs [ ] as a result of the blasting damage caused by the activities of the defendant was $9,510.00.
>
> . . .
>
> 6. The jury awarded damages in favor of the plaintiffs [ ] against the defendant for creating a nuisance upon the plaintiffs' property in the amount of $3,305.00.

The jury found for Construction Company as follows: "The jury found that the defendant had not caused

any environmental hazard to the Goff property."[5] As to punitive damages, the jury found "that the

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[5] The special verdict form and the final judgment refers to this claim as an environmental "hazard"; the jury instruction reads:

Environmental Tort

It is unlawful to dispose of solid waste in violation of the *Solid Waste Disposal Act of the State of Tennessee*. No solid waste processing facility or disposal facility or site in any political subdivision of this state shall be operated or maintained by any person unless such person has registered with the Commissioner. . . .

Whole waste tires, lead acid batteries, and used oil must be disposed of in a State approved site.

. . .

It is a violation of law for any person to knowingly cause damage to or the destruction of any real or personal property of another, knowing that the person does not have the owner's effective consent.

"Damage" includes but is not limited to: [A] Destroying, polluting or contaminating property; or [B] Tampering with property and causing pecuniary loss or substantial inconvenience to the owner or third person; and

"Polluting" is the contamination by man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of the atmosphere, water, or soil to the material injury of the right of another. Pollutants include solid waste, wrecked or discarded equipment, and industrial waste.

Plaintiff has the burden of proving by a preponderance of the evidence an environmental tort.

Although Construction Company did not raise this issue at trial or on appeal, we would point out that:

(Continued on following page)

plaintiffs had proved by clear and convincing evidence that the defendant was guilty of such egregious, intentional or reckless acts that an award of punitive damages should be assessed against the defendant as punishment for its actions."

The second phase of the trial commenced on July 1, 2006. Mr. Anderson, Construction Company's chief engineer, was the only witness to testify during this phase. Construction Company's financial statements indicated that the company had a net worth of over $46 million for the year 2000; $50 million for the year 2001; $51.1 million for the year 2002; and $54.3 million for the year 2003. Mr. Anderson testified that during the project in question, Construction Company went through hundreds of tires. He reiterated that company policy "is to return those tires to [the home office] because you have to put [the tires] on a

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> When violations occur, the [Tennessee Solid Waste Disposal] Act gives *the regulators* broad authority to stop the violation and to order steps to remedy or mitigate its effects. *The Act does not explicitly provide a private right of action for persons who have been damaged as a result of a violation*. . . . Our interpretation of the scope of remedies available under the Act will not leave without recourse those who have sustained a special or peculiar injury from a violation of the Act. The same facts may support claims of both public and private nuisances[.] . . .

Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274, 283 (Tenn. Ct. App. 1988) (emphasis added). Although we need not answer, we question whether such a cause of action labeled "environmental tort" is appropriate.

machine to see if [they] can be sectioned or recapped. You can't tell on a job." He also testified that because the project was with the State of Tennessee, if state inspectors witnessed Construction Company burying tires, which they did not, they would have penalized them or withheld payment for the project. He testified that the State of Tennessee did not cite or give any warnings to Construction Company for any improper conduct relating to the fill area.

The jury returned an award of $2 million in punitive damages against Construction Company: "We, the Jury, unanimously answer the questions submitted by the Court as follows: We find the defendant should be required to pay punitive damages in the amount of $2 million[.]"

On August 10, 2006, Construction Company filed a motion for a new trial and a motion to alter or amend the judgment, or in the alternative, remittitur. The Goffs filed a response in which they acknowledged that the judgment exceeded the *ad damnum* in their complaint, and thus did not oppose a $1 million reduction of the punitive damages award. The court granted Construction Company's request for remittitur, reducing the punitive award to $1 million "to conform to the amount the plaintiffs sued for in their ad damnum[.]" The court denied Construction Company's motion for a new trial, setting forth findings of fact and conclusions of law. The court went through the analysis set forth in ***Hodges v. S.C. Toof & Co.***, 833 S.W.2d 896, 901-02 (Tenn. 1992), and approved the $1 million punitive award.

II. Issues Presented

Appellant presents several issues for our review, the majority of which deal with the award of punitive damages. We slightly reorder and consolidate the issues as follows:

1. Whether the record supports the award of punitive damages.

2. Whether the award of punitive damages is so excessive that it is in violation of Tennessee and federal constitutional due process.

3. Whether the trial court issued an improper jury instruction concerning punitive damages.

4. Whether the trial court erred by denying Construction Company's motion for a mistrial when the Goffs introduced evidence of insurance and settlement negotiations.

III. Standard of Review

In this case, the trial court reduced the punitive damages award to conform to the *ad damnum*,[6] and then approved the $1 million punitive damages award. When the trial court approves the jury verdict in its role as "thirteenth juror," our standard of review is

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[6] A trial court cannot enter a judgment in excess of the amount sought in the plaintiff's complaint. ***Hansen ex rel. Hansen v. Bultman***, No. E2001-02664-COA-R3-CV, 2002 WL 31780680, at * 2 (Tenn. Ct. App. Dec. 13, 2002) (quotation omitted).

more deferential: we must affirm if there is any material evidence to support the verdict. Tenn. R. App. P. 13(d); ***Coffey v. Fayette Tubular Products,*** 929 S.W.2d 326, 331 n.2 (Tenn. 1996) (citing *Ellis v. White Freightliner Corp.,* 603 S.W.2d 125, 129 (Tenn. 1980); *Benson v. Tennessee Valley Elec. Co-op.,* 868 S.W.2d 630, 640 (Tenn. Ct. App. 1993)). We review the trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. ***Union Carbide Corp. v. Huddleston,*** 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.,* 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. Discussion

Construction Company raises several arguments concerning the punitive damages award. First, we will address its argument that the trial court incorrectly relied on the environmental tort in approving the jury's award of punitive damages, because the jury rejected that cause of action and declined to award compensatory damages on that basis.

Our Supreme Court, in ***Hodges v. S.C. Toof & Co.,*** 833 S.W.2d 896, 901-02 (Tenn. 1992), laid out the procedural framework for awarding punitive damages. First, the plaintiff must prove by clear and convincing evidence that the defendant acted (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly. ***Id.*** at 900-01. Upon such a finding, the jury must then determine the amount of damages during the second

phase of the trial, taking into consideration the following:

(1) The defendant's financial affairs, financial condition, and net worth;

(2) The nature and reprehensibility of defendant's wrongdoing, for example[:]

(A) The impact of defendant's conduct on the plaintiff, or

(B) The relationship of defendant to plaintiff;

(3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;

(4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;

(5) The expense plaintiff has borne in the attempt to recover the losses;

(6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;

(7) Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act;

(8) Whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by

> offering a prompt and fair settlement for actual harm caused; and
>
> (9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Id. at 901-02. The Court later explained in ***Metcalfe v. Waters***, 970 S.W.2d 448, 452 (Tenn. 1998), that the aforementioned factors "are also necessarily considered with respect to the threshold liability issue[.] . . . [O]nly evidence of a defendant's net worth or financial condition is deemed inadmissible in determining a defendant's liability for punitive damages." (citation omitted).

As to the evidentiary standard, clear and convincing evidence is "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." ***Goodale v. Langenberg***, 243 S.W.3d 575, 589 (Tenn. Ct. App. 2007). Clear and convincing evidence should "produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established." ***Id.*** (quoting *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000)). Clear and convincing evidence means that the truth of the facts asserted is "highly probable," as opposed to the lesser standard of preponderance of the evidence, which is a "more probable" standard. ***Id.***

The higher evidentiary standard helps limit the imposition of punitive damages to only the most egregious of cases. Furthermore, "it is well-settled that

punitive damages are not intended to compensate an injured plaintiff but may be awarded by the jury for the purposes of punishing wrongdoers and deterring them from similar conduct in the future." ***Coffey v. Fayette Tubular Products,*** 929 S.W.2d 326, 328 (Tenn. 1996) (citing *Huckeby v. Spangler,* 563 S.W.2d 555, 558-59 (Tenn. 1978)). Compensatory damages are to "compensate an injured plaintiff for personal injury or property damage, but [punitive damages are meant] to punish a defendant, to deter him from committing acts of a similar nature, and to make a public example of him." ***Emerson v. Oak Ridge Research, Inc.,*** 187 S.W.3d 364, 372 (Tenn. Ct. App. 2005) (quotation omitted).

Relevant to this case is intentional and reckless conduct: the jury found that the Goffs had proven by clear and convincing evidence that Construction Company "was guilty of such egregious, intentional or reckless acts," and thus, punitive damages were warranted.

> A person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result. . . . A person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.

Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) (citations omitted). If the jury returns an award of punitive damages, then the trial judge must review the award, "giving consideration to all matters on which the jury is required to be instructed. The judge shall clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed." ***Id.*** at 902.

Turning back to the present case, Construction Company argues that the trial court incorrectly relied on the environmental tort in approving the jury's award of punitive damages, because the jury rejected that cause of action and declined to award compensatory damages on that basis. We agree. Construction Company goes on to argue that "[w]here there is a finding that plaintiff has suffered no actual damage (in this case under the environmental hazard claim), no punitive damages may be awarded." We disagree with this contention, however, because the jury found that the Goffs were legally injured and awarded actual damages based on the claim of nuisance. The trial court, however, discussed in great length the environmental tort claim as support for its decision to uphold the jury award of $1 million in punitive damages:

2. *The Nature and Reprehensibility of the Defendant's Wrongdoing*

. . . By intentionally burying tires eight feet tall, thirty-two inches in diameter, and weighing over one ton, the defendant clearly violated the solid waste disposal act. The policy of the state to avoid pollution and the creation of unpermitted landfills was intentionally violated on the lands of another and justifies a substantial punitive damages award.

. . .

4. *The Relationship of Defendant to Plaintiff*

. . . The defendant's intentional violation of the solid waste disposal act by polluting defendant's property . . . requires a substantial award of punitive damages.

5. *The Defendant's Awareness of the Amount of Harm being caused and the Defendant's Motivation in Causing the Harm*

The defendant was aware of state policy regarding landfills and pollution. The defendant knew how large tires were required to be cut up and shredded and then disposed of in an approved site.

. . . .

11. *Any Other Circumstances Shown by the Evidence That Bear on Determining the Property [sic] Amount of Punitive Damages*

The State of Tennessee has a strong and legitimate interest in preventing construction companies, especially construction companies being paid under contract with the state, from dumping or polluting property located within the state. Burying solid waste tires is a violation of Tennessee Solid Waste Disposal Act. *Tennessee Code Annotated* Section 68-11-866 and 867. For violation of the act, violators are subject to civil penalties of up to $5,000.00 per day. *Tennessee Code Annotated* Section 68-22-117. In addition, a violation of the act constitutes a Class B misdemeanor for each day the violation continues.

In this case, the violation of state policy and law was not discovered by the state in spite of the fact that DOT inspectors were on the fill area on a daily basis. State officials who testified at trial seemed to minimize the violations. The jury could have concluded, and the court does conclude, that if state policy of preserving the environment and enforcing penalties the legislature has proscribed for violation of the policy in this case, it was up to this jury to impose an appropriate penalty to punish the defendant. . . .

In this case, the only claim upon which punitive damages could be based upon is the nuisance claim,

as the jury found Construction Company not liable for the environmental tort. Here, the Goffs focus on the expert testimony that the cost to clean the fill area would be $318,000, and that the award of damages based on the nuisance claim "did not encompass the full harm the plaintiffs sustained. The harm to the plaintiffs goes beyond their legally recoverable damages." The Goffs' sought in their complaint recovery of "the costs and expenses of excavating, removing, and disposal of the waste materials buried upon the property." The jury, however, declined to make such an award. The trial court stated in its findings of fact that "the jury's compensatory damages award was very modest. The evidence would have supported a verdict of over $100,000." Whatever the jury's reasoning for the "modest" award, punitive damages cannot be used to make up for a low compensatory award.

The trial court's findings of fact and conclusions of law are insufficient in that they rely heavily on the environmental tort claim, a theory which the jury rejected. We therefore reverse the award of punitive damages and remand the case to the trial court. On remand, the trial court should apply the ***Hodges*** factors and make appropriate findings of fact and conclusions of law in approving or decreasing the award of punitive damages, if the court deems appropriate, based on the nuisance theory.[7] *See generally*

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[7] Construction Company does not raise issue with the award of compensatory damages based on the nuisance claim. Seemingly inconsistent, Construction Company's brief states that

(Continued on following page)

Emerson v. Oak Ridge Research, Inc., 187 S.W.3d 364, 374 (Tenn. Ct. App. 2005) ("Since the Trial Court failed to make such findings and did not conduct the proper analysis in this case, the issue of punitive damages is remanded and the Trial Court is directed to comply with the requirements of ***Hodges*** and ***Culbreath***."). Because of our holding, we need not address Construction Company's constitutional argument regarding the excessiveness of the award.

B. Jury Instruction: Punitive Damages

Next, Construction Company argues that the trial court erred in instructing the jury on the issue of punitive damages. Construction Company points to two alleged errors here: (1) the fact that the court did not instruct the jury that punitive damages "are only proper in egregious circumstances" and (2) "where [the court] charged intentional or reckless conduct as

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"[t]he only basis on which the jury could award punitive damages is on plaintiffs' nuisance claim, the only claim supported by compensatory damages[.]" Construction Company later argues, however, that "[n]uisance is not the type of damage for which punitive damages were contemplated in this case." Apparently Construction Company is arguing that the nuisance jury instruction did not mention punitive damages. This argument has no merit, as the separate jury instruction concerning punitive damages stated: "You may consider an award of punitive damages only if you find that the plaintiff has suffered actual damage as a legal result of the defendant's fault and you have made an award for compensatory damages for either an environmental tort or nuisance."

the basis for punitive damages where [the Goffs] pled only intentional and fraudulent conduct."

We review jury charges in their entirety in order to determine whether the trial court committed reversible error. ***Godbee v. Dimick***, 213 S.W.3d 865, 880 (Tenn. Ct. App. 2006) (citing *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992)). "A verdict will be reversed if it can be shown that an instruction contains an inaccurate statement of the law or is confusing and, considering the charge of the court as a whole, that the error was not harmless, i.e. that the instruction more likely than not affected the outcome of the trial." ***Id.*** (citations omitted).

As for the instruction concerning punitive damages, Construction Company sought the inclusion of the following: "Punitive damages are to be awarded only in the most egregious of cases." The trial court declined to include this proposed addition. We first point out that "[t]he fact that a special request for jury instruction asserts a correct rule of law does not make it proper jury charge material." ***Godbee v. Dimick***, 213 S.W.3d 865, 881 (Tenn. Ct. App. 2006) (citations omitted). The jury instruction read, in part: "The purpose of punitive damages is not to further compensate the plaintiff but to punish a wrongdoer and deter others from committing similar wrongs in the future." The instruction complies with ***Hodges*** and we find no error here.

Construction Company next argues that it was error to add the term "reckless" to the punitive

damages jury instruction when the Goffs pled "fraudulent." A jury instruction should "reflect the theories that are supported by the parties' pleadings and proof, as well as the parties' claims and defenses." ***Goodale v. Langenberg,*** 243 S.W.3d 575, 584 (Tenn. Ct. App. 2007) (citing *Cole v. Woods,* 548 S.W.2d 640, 642 (Tenn. 1977)).

The instruction read: "Punitive damages may be considered if, and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted either intentionally or recklessly." As Construction Company points out, the Goffs pled only intentional or fraudulent conduct. This argument was raised in Construction Company's motion for a new trial, but it does not appear that any specific objection was raised to that part of the instruction during trial. And as the Goffs point out, Construction Company's counsel referred several times throughout the trial to its alleged "reckless conduct." Rule 15.02 of the Tennessee Rules of Civil Procedure provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

"The determination of whether there was implied consent rests in the discretion of the trial judge, whose determination can be reversed only upon a finding of abuse." ***Zack Cheek Builders, Inc. v. McLeod,*** 597 S.W.2d 888, 891 (Tenn. 1980) (citation omitted). In this case, the trial judge determined that a punitive damages charge based on intentional and reckless conduct was needed based on the evidence presented, and that there was no evidence from which the jury could find that punitive damages should be imposed based on Construction Company's fraudulent conduct. We cannot say that the lower court abused its discretion in making this decision.

C. Evidence of Insurance and Settlement Negotiations

Finally, Construction Company argues that the trial court should have granted its motion for a mistrial because "where the compensatory damages were so minimal while the punitive damages were so excessive, it is likely that the jury did recall the reference to insurance in deciding the monetary awards[.]"

"It is well settled that the decision of whether to grant a motion for mistrial is within the sound discretion of the trial court." ***Willis v. Settle,*** 162 S.W.3d 169, 188 (Tenn. Ct. App. 2004) (citing *State v. McKinney,* 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996)). Absent an abuse of discretion, we will not disturb the trial court's decision to deny a motion for mistrial. ***Id.*** (citations omitted). The trial court should grant a mistrial if reference to liability insurance was

made wilfully for the purpose of influencing the jury. ***Terry v. Plateau Elec. Co-op.,*** 825 S.W.2d 418, 422 (Tenn. Ct. App. 1991) (citation omitted). We find no proof that such mention of insurance affected the result of the trial, or that the Goffs' counsel willfully and voluntarily referred to insurance in order to influence the jury. *See* ***McClard v. Reid,*** 190 Tenn. 337, 340, 229 S.W.2d 505, 506 (Tenn. 1950) ("[I]t is more or less a question for the trial court, to exercise his discretion on, as to whether or not the plaintiff has deliberately injected the insurance question to the prejudice of the defendant."); ***Ailor v. City of Maynardville,*** No. 03A01-9605-CV-00158, 1996 WL 722041, at *4 (Tenn. Ct. App. Dec. 17, 1996). Although the curative instruction did seem to emphasize the point that Construction Company did indeed have insurance, we cannot say that the trial court abused its discretion in refusing to grant Construction Company's motion for a mistrial.

V. CONCLUSION

As discussed, we reverse the award of punitive damages and remand that issue to the trial court. We affirm the decision of the trial court on the other matters. Costs of this appeal are taxed to Appellant, Elmo Greer & Sons Construction Co., Inc., and its surety, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.

IN THE CIRCUIT COURT
FOR WHITE COUNTY, TENNESSEE.

DAVID GOFF and wife, JOYCE GOFF, and AGNES GOFF,	)	
Plaintiffs,	)	
VERSUS	)	**CIVIL ACTION NO. CC-320**
ELMO GREER & SONS CONSTRUCTION COMPANY, INC.,	)	
Defendant.	)	

ORDER

(Filed Nov. 9, 2006)

THIS CAUSE came on to be further and finally heard before Honorable John A. Turnbull at Chambers in Livingston, Tennessee, on the 15th day of September, 2006, upon the post trial motions of the defendant, Elmo Greer & Sons Construction Company, Inc., the plaintiffs responses to said motions, statement of counsel for the respective parties and the entire record in this cause from all of which the Court found that the Motion for New Trial filed on behalf of the defendant was not well taken and should be overruled and dismissed.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's Motion for New Trial is hereby overruled and dismissed.

The Court further considered the grounds asserted by the defendant in it's Motion to Set Aside Verdict and Enter Judgment in Accordance with the Defendant's Motion for Directed Verdict and deemed same to be without merit and should be overruled and dismissed.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Set Aside Verdict and Enter Judgment in Accordance with the Defendant's Motion for Directed Verdict is overruled and dismissed.

The Court then considered the defendant's Motion to Alter or Amend the Judgment or, Alternatively, for a Remittitur and has made a finding of fact and conclusions of law on the issue of the punitive damages awarded by the jury in this cause and has concluded that a reduction of the punitive damage award was required to conform to the amount the plaintiffs sued for in their ad damnum and that this reduction should be in the amount of $1,000,000.00, The Court did find however that a judgment of $1,000,000.00 in punitive damages is an appropriate award that is fair, reasonable and justified under the law and evidence for punishment of the defendant's conduct and necessary to deter this defendant and others similarly situated from further violating the rights of these plaintiffs and others and the laws of the state for reasons more fully set forth in the Court's attached ***Punitive Damages: Findings of Fact and Conclusions of Law,*** that the rights of

the defendant have not been violated by the punitive damages award.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Alter or Amend the Judgment or, Alternatively, for a Remittitur, is allowed to the extent that the punitive damage award shall be reduced by $1,000,000.00 and it is further **ORDERED** that the plaintiffs, David Goff and Agnes Goff, have and recover of the defendant, Elmo Greer & Sons Construction Company, Inc., the sum of One Million ($1,000,000.00) Dollars in punitive damages and the remainder of the judgment heretofore entered upon the jury verdict is hereby ratified, confirmed and approved by the Court except as modified herein. The Court's ***Findings of Fact and Conclusions of Law*** is ordered filed as a part of this order.

The defendant shall pay the costs of this cause for which execution may issue, if necessary.

ENTER this the 6 day of ~~October~~ Nov., 2006.

/s/ John Turnbull
JOHN A. TURNBULL,
CIRCUIT JUDGE

APPROVED FOR ENTRY:

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In The Circuit Court for White County, Tennessee

David Goff and wife, Joyce Goff, and Agnes Goff, Plaintiffs	
v.	**Civil Action No. CC-320**
Elmo Greer & Sons Construction Company, Inc., Defendants	

Punitive Damages: Findings of Fact and Conclusions of Law

(Filed Nov. 9, 2008)

The Tennessee Supreme Court has made it very clear that the trial court must thoroughly review any award of punitive damages made by the jury. *Coffee v. Fayette Tubular Products*, 929 SW2d 326, at 328 (Tenn. 1996). The trial judge "shall review the award, giving consideration to all matters on which the jury is required to be instructed. The judge shall clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed." *Hodges v. S.C. Toof & Co.*, 833 S.W2d 896 at 902. In addition, the trial court must examine the award to assure that constitutional due process is afforded the defendant. *See BMW of*

North America v. Gore, 517 U.S. 559 (1996) and *State Farm v. Campbell*, 538 U.S. 408 (2003).

Findings of Fact

David Goff and his mother, Agnes Goff, were, at all times material, the owners of a large 400 + acre tract lying mostly to the east of construction on new State Highway 111 in White County, Tennessee. The Goffs entered into a written agreement whereby the defendant was permitted to place excess dirt and rock on an area of five to seven acres of the tract fronting on new Highway 111. The defendant was to pay the Goffs ten cents per cubic yard for all fill deposited on their property. See trial exhibit 45. During the construction project, the defendant began using the partially filled area as a service area where the large earth and rock moving equipment were serviced, repairs were made, and tires were changed on the equipment. As time went on, Mr. Goff witnessed garbage, tires, large oil cans, etc., being partially buried on the property. Deposits of oil and other fluids covered an area of approximately 20 feet by 20 feet. Mr. Goff questioned the supervising employees of the defendant and was repeatedly assured that the impermissible solid waste materials would be removed and not buried. In spite of those assurances, the court finds by clear and convincing evidence that the defendant, through its employees, intentionally buried large tires, some of them eight feet tall, thirty-two inches wide, and weighing over one ton, under several feet of fill on the Goff property. Again, after

completion of the project, the defendant denied burying impermissible waste on the plaintiff's property. David Goff remained suspicious that his property had been turned into an [sic] non-permitted landfill by the defendant. The evidence showed that the Goff property was situated near the interchange of 111 and 70 South, and is in close proximity to Sparta. As such, it had potential as development property. Mr. Goff was concerned that he would be subject to liability if he developed or sold the property. When the defendant failed to timely pay for the fill deposited, Mr. Goff, on two separate occasions, hired a track hoe to dig a small portion of the fill where he suspected impermissible waste had been buried. Six large tires and two pieces of pipe were unearthed. At trial, the defendant's representative officer, Lee Anderson, continued to deny that his company had buried tires and other waste. Scientific testing by defendant failed to reveal any toxic waste had been buried on the Goff property. State law forbids the disposal of waste materials, including tires, in an unpermitted landfill. See *Tenn. Code Annotated,* Section 68-11-866, 867. In addition, state law provides for civil penalties of up to $5,000.00 per day for each violation of the act. *Tenn. Code Annotated* Section 68-211-117. State officials did not impose any penalties on the defendant. Tennessee Department of Transportation inspectors were on the subject property on a daily basis, but failed to observe or report any violations.

The jury verdict as to compensatory damages for blasting was modest in the amount of $9,510.00. In the court's judgment, although not at issue here, the evidence would have supported a markedly higher blasting damage award. The jury found no environmental tort had been proven by a preponderance of the evidence, but made an award of $3,306.00 for nuisance. Again, the jury was conservative, under the proof, in the amount of compensatory damages awarded. However, the jury found, under the instructions and evidence, that there was clear and convincing evidence that the defendant had acted recklessly or intentionally and found that punitive damages should be awarded. At the subsequent bifurcated portion of the trial the evidence showed the defendant had net worth and income as follows:

The Year	Member Equity	Net Income
2000	$46,600,000	$17,400,000
2001	50,000,000	11,000,000
2002	51,100,000	3,800,000
2003	54,300,000	3,200,000

The defendant was paid 13.5 million dollars by the state for the work performed on the 111 project which was in operation for three years beginning March, 1997. The jury returned a verdict in which punitive damages were fixed at $2,000,000.00.

The parties have stipulated in their briefs that plaintiffs sued for $1,000,000.00 for punitive damages. The parties have further agreed that under the authority of *Coffee v. Livingston Tubular Products*, supra, and other precedent, the award cannot exceed

the ad damnum, and must be reduced to one million dollars. It is incumbent on the court to thoroughly review the remaining one million dollar punitive damages award, giving consideration to all matters on which the jury is required to be instructed, and to clearly set forth the reasons for decreasing or approving the award in findings of fact or conclusions of law demonstrating a consideration of all factors on which the jury is instructed.

Parenthetically, the court on oral argument, has found that the motion for directed verdict was properly overruled, and defendant's motion for new trial on other grounds was denied, leaving for consideration here the amount of punitive damages. The court will address each of the following factors the jury was instructed to consider when setting the amount of punitive damages.

1. **Defendant's Financial Affairs, Financial Condition, and Net Worth**

The defendant's net worth of approximately fifty million dollars and income of 13 million in the year 2000 when the contract was completed demonstrate substantial assets and income. Wealth alone does not justify a large punitive damage award, but can give guidance regarding the amount of damages which would constitute a deterrence to future egregious conduct.

2. **The Nature and Reprehensibility of the Defendant's Wrongdoing**

The court finds by clear and convincing evidence that defendant's conduct was intentional and reprehensible. The defendant cannot hide behind a "we didn't mean to" or "it wasn't us" defense. By intentionally burying tires eight feet tall, thirty-two inches in diameter, and weighing over one ton, the defendant clearly violated the solid waste disposal act. The policy of the state to avoid pollution and the creation of unpermitted landfills was intentionally violated on the lands of another and justifies a substantial punitive damages award. The defense raised, that there is no evidence the burying of tires was intentional, fails to pass the "giggle test." Any country boy knows that you deserve a harder "lickin" if you fail to "own up" to a misdeed and try to lie out of it.

3. **Impact of Defendant's Conduct on the Plaintiffs**

The impact upon plaintiffs land and property rights are largely unknown and somewhat speculative. Should the property be developed in the future, a likely eventuality, a prudent owner/seller would need to advise a prospective buyer of the possibility that other solid waste may have been buried within the fill area. Real estate appraisers for both the plaintiff and defendant testified that such revelation would impact negatively the future sales price of the property. The jury's compensatory

damages award was very modest. The evidence would have supported a verdict of over $100,000.00. Instead, the jury was very careful and conservative in its award of compensatory damages. This was no run-away jury. All of which lends support to the court's belief that the jury very carefully considered the court's instructions regarding how they should determine the amount of punitive damages to be awarded.

4. The Relationship of Defendant to Plaintiff

The parties had a contractual relationship which required good faith and honest dealing. Defendant lied to plaintiff, Mr. Goff, when he was reassured on inquiry that no tires or waste would be buried. The plaintiffs could not be present twenty-four hours a day to assure that defendant would not surreptitiously pollute their land, and good faith honest dealing should not require such vigilance. Instead, people in White County trust others to keep their word. The Goffs' trust was sadly misplaced.

The defendant's intentional violation of the solid waste disposal act by polluting defendant's property, and the defendant's dishonesty and breach of good faith dealing requires a substantial award of punitive damages.

5. **The Defendant's Awareness of the Amount of Harm being caused and the Defendant's Motivation in Causing the Harm**

The defendant was aware of state policy regarding landfills and pollution. The defendant knew how large tires were required to be cut up and shredded and then disposed of in an approved site. It is difficult to determine defendant's motivation. Was it convenience? Was it laziness? Was it "we won't get caught?" Was it to save money and increase profit? Whatever the motivation, it was not admirable. Since defendant refused to admit their wrong, no motivation could be admitted or ascribed for the wrong. No true remorse is apparent. A large punitive damage award is needed to get the attention of the defendant, and assure that the defendant cannot conceal its misdeeds.

6. **The Duration of the Defendant's Misconduct and Whether the Defendant Attempted to Conceal the Conduct**

The defendant continued to conceal its misconduct for six or seven years. The defendant refused to admit its intentional act. Even when faced with huge tires dug up on the property, the defendant accepted no responsibility. The defendant still argues that there is no proof of intentional misconduct.

7. The Expense Plaintiffs have borne in the Attempt to Recover Their Losses

To prove their case, plaintiffs were required to hire a track hoe to dig through a portion of the fill at an expense of over three thousand dollars. An expert real estate appraiser and expert geologist were retained by plaintiff and testified at trial. The amount of their charges are not in the trial record.

8. Whether Defendant Profited from the Activity

The record is devoid of evidence as to what, if any, profit the defendant derived from its misconduct.

9. Previous Punitive Damages Awards Based on the Same Wrongful Act

The record does not reflect any other punitive damages awards against the defendant.

10. Whether, Once the Misconduct became Known to the Defendant Defendant Took Remedial Action or Attempted to Make Amends by Offering a Prompt and Fair Settlement for Actual Harm Caused

The only way the plaintiffs can be certain that there are not other impermissible waste materials buried under the fill on their land would be to engage in extensive digging on their property. Estimates at trial indicated a potential cost of up to $375,000.00.

The Damages were not awarded by the jury. However, defendant has large equipment which could accomplish the search at much reduced cost. No offer was made at trial to provide equipment for such a search. There is no evidence in the record of any settlement offers. This factor weighs in favor of an award for punitive damages.

11. Any Other Circumstances Shown by the Evidence That Bear on Determining the Property Amount of Punitive Damages

The State of Tennessee has a strong and legitimate interest in preventing construction companies, especially construction companies being paid under contract with the state, from dumping or polluting property located within the state. Burying solid waste tires is a violation of Tennessee Solid Waste Disposal Act. *Tennessee Code Annotated* Section 68-11-866 and 867. For violation of the act, violators are subject to civil penalties of up to $5,000.00 per day. *Tennessee Code Annotated,* Section 68-211-117. In addition, a violation of the act constitutes a Class B misdemeanor for each day the violation continues.

In this case, the violation of state policy and law was not discovered by the state in spite of the fact that DOT inspectors were on the fill area on a daily basis. State officials who testified at trial seemed to minimize the violations. The jury could have concluded, and the court does conclude, that if state

policy of preserving the environment and enforcing penalties the legislature has proscribed for violation of the policy in this case, it was up to this jury to impose an appropriate penalty to punish the defendant and to deter this construction company and others similarly situated from similar egregious conduct in the future. This jury decided it was not going to simply look the other way, but instead, was going to impose a penalty which would get the attention of this defendant and others who might be inclined to take the easy way out by burying their problems. This corporation had no bottom to be spanked, no soul to be damned. The only meaningful message that could be sent by the jury was through a penalty that impacted the defendant's balance sheet.

Due Process Examination

The United States Supreme Court has, over the past several years, imposed an obligation on the court to examine carefully punitive damages awards to determine whether the award is excessive under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Whether a punitive damage award exceeds the gross excessiveness standard of the Due Process Clause is a question of law. In reviewing whether a punitive damages award, the reviewing court construes all facts in favor of plaintiff, the party in whose favor the jury ruled. *State Farm Mutual Automobile Ins. Co. v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L. Ed.2d 585 (2003). *BMW of North American* [sic], *Inc. v. Gore,*

517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). In *BMW,* the courts are directed to perform an exacting review of a jury's punitive damages award considering three "guideposts":

[1] the degree of reprehensibility of defendant's misconduct;

[2] the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

[3] the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Campbell*, 538 U.S. at 418

Guidepost I.

The first guidepost, the reprehensibility of defendant's conduct, represents "the most important indicium of the reasonableness of a punitive damages award." *Campbell,* Id. at 419. In analyzing reprehensibility, courts should consider whether:

[a] the harm caused was physical as opposed to economic;

[b] the tortuous conduct evinced an indifference to or reckless disregard of the health or safety of others;

[c] the target of the conduct had financial vulnerability;

[d] the conduct involved repeated actions or was an isolated incident; and

[e] the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Campbell,* Id. at 419.

The court has above discussed the evidence in this case as it demonstrates reprehensibility. Defendant's conduct was intentional and involved trickery and deceit, and was not mere accident. The misconduct showed a reckless disregard of the health laws and policy of the state. Although no repeated violations were shown, absent an appropriate penalty, it is easy to anticipate future violations when taking into account the defendant's attitude at trial. This most important factor weighs heavily in favor of a substantial punitive damages award.

In *Campbell,* great emphasis was placed on out of state conduct and the court indicated a state cannot punish a defendant for its unlawful conduct that "occurred outside (the state) to other persons." *Campbell,* 538 U.S. at 421. Here, no out of state conduct occurred. The policies to be enforced are those of this state, to protect its citizens including the citizens of White County. "Punitive damages may properly be imposed to further a state's legitimate interest in punishing unlawful conduct and deterring its repetition." *BMW*, 517 U.S. at p. 568. "In our federal system, states necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of

cases and in any particular case. Most states that authorize exemplary damages afford the jury similar latitude, *requiring only that the damages award be reasonably necessary to vindicate the state's legitimate interest in punishment and deterrence.*" Id. at 568. [emphasis added] "A basic principal of federalism is that each state may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each state alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Campbell,* 538 U.S. at 422. In both *BMW* and *Campbell,* the punitive damages awards were originally assessed based on the defendant's conduct in many states. Here, the punitive damages were set by the jury based on the defendant's egregious conduct in White county, Tennessee, and not elsewhere.

Guidepost II

The second guidepost examines the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award. Here, the defendant complains that the punitive damages award is grossly excessive because it exceeds compensatory damages awarded by the jury by a ratio of 302 to 1. At first blush, *Campbell* and *BMW* would appear to frown upon ratios of punitive damages exceeding nine times. *Campbell*, 538 U.S. at 425. A closer examination of the cases reveal that there are cases with larger ratios which can pass due process analysis. In both *Campbell* and *BMW,* the

Supreme Court refused to adopt a simple bright line mathematical formula between constitutionally acceptable and constitutionally unacceptable punitive damages awards, *BMW* at p. 582 and *Campbell* at 435. The court in *BMW* went on to observe that even when the ratio of punitive damages as compared to compensatory damages is 500 to 1, the award is not automatically unconstitutional, but rather should be scrutinized and must overcome a presumption against such high ratios. See *BMW* at p. 583 and *Campbell* at p. 426.

In refusing to adopt a bright line mathematical formula to calculate punitive damages, the Supreme Court has discussed cases similar to the present case. "Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might be difficult to determine." *BMW* 517 U. S. 582. Likewise, when compensatory damages are substantial, a lower ratio of compensatory to punitive damages is appropriate. *Campbell,* 538 U.S. 425, 429. Tennessee Appellate courts have not yet expressed reaction as to how the policies of this state impact such ratios. The court is convinced that bright line ratios will not be sanctioned in this state. Instead, the entire purpose of punitive damages and its application to state policy will prevail. The facts upon

which each award is based will be scrutinized, not relegated to any simplistic formula which may not further the health or safety of Tennessee citizens. The rights of all citizens will be balanced to further state policies and protect due process rights of defendants.

Guidepost III

The third guidepost involves an analysis of the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Insofar as the court can discern from *Campbell,* the "comparable sanctions" guidepost require three steps. First, courts must identify comparable civil or criminal sanctions. Second, courts must consider how serious the comparable sanctions are, relative to the universe of sanctions that the legislature authorizes to punish inappropriate conduct. Third, courts must then evaluate the punitive damage award in light of the relative severity of the comparable sanctions. The guidepost may militate against a significant punitive damage award if the state's comparable sanctions are mild, trivial, or nonexistent. However, the guidepost will support a more significant punitive damage award when the state's comparable sanctions are severe. See *Williams v. Phillip Morris Inc.,* 127 P3d 1165 Oregon Sup. Ct. (2006) at p. 1178, 1179. (The U.S. Supreme Court has granted certiorari on this case.)

Tennessee has provided similar available civil sanctions for comparable conduct. Tennessee Code Annotated Section 68-211-117 provides for civil penalties up to $5,000.00 per day for violation of the solid Waste Disposal Act. The proof in this case is clear and convincing that the tires had been illegally disposed of and buried for at least seven years. A maximum fine of $5,000.00 for each of those 2,500 days would exceed twelve million dollars. Such a huge potential civil penalty emphasizes the importance of the Tennessee policy to preserve the earth in an unpolluted condition. Tennessee is a state which has sought through its legislatively stated policies and available penalties, to protect and preserve our environment. Public health and safety have a high priority. We cannot simply slap the hands of those who intentionally violate our state policy designed to preserve our environment.

Conclusion

For the reasons stated above, after strict scrutiny, the court approves the remaining punitive damages award in the amount of $1,000,000.00. The award does not violate the defendant's due process rights under the Fourteenth Amendment of the United States Constitution. The award provides an appropriate punishment for defendant's egregious intentional conduct. The amount of the award is necessary to deter this defendant and others similarly situate [sic] from further violating the rights of other landowners and the policies of this state. The plaintiff

will prepare an appropriate judgment in accordance with this opinion. Plaintiffs' discretionary costs as set out in the original and amended motion are granted.

Enter: October 4, 2006.

/s/ John A. Turnbull
John A. Turnbull,
Circuit Judge

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IN THE CIRCUIT COURT
FOR WHITE COUNTY, TENNESSEE.

DAVID GOFF and wife, JOYCE GOFF, and AGNES GOFF,	)	
Plaintiffs,	)	
VERSUS	)	**CIVIL ACTION NO. CC-320-T**
ELMO GREER & SONS CONSTRUCTION COMPANY, INC.,	)	
Defendant.	)	

JUDGMENT

THIS CAUSE came on to be heard before Honorable John A. Turnbull, Circuit Judge for White County, Tennessee, and a jury of good and lawful citizens of said County, to wit: Jeffrey Lynn Boles, Shirley Braddom, Justin Crockett, Paul Olsen, Roger Wilson, Carol Simcox, Allan R. Clouse and Carol Davis, all of whom were duly sworn to try the issues joined between the plaintiffs, DAVID GOFF, JOYCE GOFF and AGNES GOFF, and the defendant, ELMO GREER & SONS CONSTRUCTION COMPANY, INC., commencing on June 28 and concluding on July 1, 2006 with the jury being cautioned at the close of each day not to discuss the case individually or collectively until they lawfully commenced deliberation. At the conclusion of all of the evidence, testimony of witnesses, exhibits introduced, argument of counsel and charge of the Court a special

verdict form was provided to the jury, and after due consideration the jury did report to the Court and submit their verdict form that was duly filed on June 30, 2006, announcing the unanimous decision of the jury as follows:

1. For breach of contract, the defendant, Elmo Greer & Sons Construction Co., Inc., shall pay unto the plaintiffs, David Goff and Agnes Goff, the sum of $5,355.50, as agreed by the parties. (The Court does reserve the calculation of pre-judgment interest).

2. The jury reported that it found that the defendant had caused blasting damage to the plaintiffs' house. In addition thereto, the jury had been instructed by the Court pursuant to a question raised by the jury that this section of the verdict form should also include motor vehicles.

3. The jury did find that the damages suffered by the plaintiffs, David Goff and Joyce Goff, as a result of blasting damage caused by the activities of the defendant was $9,510.00.

4. The jury found that the defendant had not caused any environmental hazard to the Goff property.

5. The jury found that the defendant had created a nuisance upon the property of the plaintiffs, David Goff and Agnes Goff.

6. The jury awarded damages in favor of the plaintiffs, David Goff and Agnes Goff, against the

defendant for creating a nuisance upon the plaintiffs' property in the amount of $3,305.00.

7. The jury found that the plaintiffs had proved by clear and convincing evidence that the defendant was guilty of such egregious, intentional or reckless acts that an award of punitive damages should be assessed against the defendant as punishment for its actions.

WHEREUPON, the Court did recess the trial on June 30, 2006, and directed the jury and the parties to return at 9:00 A.M. on July 1, 2006, for further proceedings on the issue of punitive damages. The Court reconvened as scheduled for further proceedings on the issue of punitive damages and after additional testimony, exhibits and argument of counsel, the Court did give the jury additional instructions on the issue of punitive damages and submitted to them a punitive damage verdict form and the jury did retire and after due consideration, returned in open Court with its verdict form that the Court has ordered filed and found that the defendant, Elmo Greer & Sons Construction Company, Inc., shall pay to the plaintiffs, David Goff and Agnes Goff, the sum of $2,000,000.00 as punitive damages. The Court accepted the verdict and discharged the jury.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED by the Court that upon the verdict of the jury that the plaintiffs, David Goff and Agnes Goff, have and recover of the defendant, Elmo Greer & Sons Construction Co., Inc., for breach

of contract the sum of Five Thousand Three Hundred Fifty Five and 50/100 ($5,355.50) Dollars plus pre-judgment interest to be determined and calculated by the Court by later order.

It is further ORDERED that the plaintiffs, David Goff and Joyce Goff, have and recover of the said defendant the sum of Nine Thousand Five Hundred Ten and 00/100 ($9510.00) Dollars as damages to plaintiffs' property due to blasting activities of defendant.

It is further ORDERED by the Court upon the jury verdict that the plaintiffs, David Goff and Agnes Goff, have and recover of the said defendant for its committed acts of nuisance upon the property of plaintiffs the sum of Three Thousand Three Hundred Five and 00/100 ($3,305.00) Dollars as damages.

Upon the verdict of the jury in the penalty phase of this cause, it is ORDERED by the Court that the plaintiffs, David Goff and Agnes Goff, have and recover of the defendant, Elmo Greer & Sons Construction Co., Inc., the sum of Two Million and 00/100 ($2,000,000.00) Dollars as punitive damages.

The said defendant shall pay the costs of this cause for which execution may issue if necessary.

The Court directs that counsel for the parties that intend to file post-trial motions promptly schedule a hearing thereon but in no event later than the time provided in Local Rule 10.08 after the filing of such motions and all other things and matters are reserved pending further action of the Court.

ENTER this the 14 day of July, 2006.

/s/ John A. Turnbull
JOHN A. TURNBULL,
CIRCUIT JUDGE

APPROVED FOR ENTRY:

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